UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 05-44482-rdd

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In the Matter of:

DELPHI CORPORATION,

Debtor.

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York

February 26, 2008

10:23 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

HEARING re motion to authorize expedited motion under 11 U.S.C. Section 363 and Fed. R. Bankr. R. 9019 for order authorizing debtors' performance under modified pension funding waivers issued by United States Internal Revenue Services and related letters of credit issued by Delphi Corporation to Pension Benefit Guaranty Corporation (related document(s)[10726], [8117]) filed by John Wm. Butler, Jr., on behalf of Delphi Corporation.

Transcribed by: Pnina Eilberg

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P R O C E E D I N G S

THE COURT: Okay. Delphi Corporation.

MR. BUTLER: Your Honor, good morning. Jack Butler, Kayalyn Marafioti and Ron Meisler on behalf of -- from Skadden Arps on behalf of Delphi Corporation for a continuation of a matter from the omnibus hearing last week and two other matters that are set forth on a non-omnibus hearing agenda that's been filed by the Court. And we'd like to take the matters in the order on the agenda.

THE COURT: Okay. That's fine.

MR. BUTLER: Your Honor. Matter number one on the agenda for today is the debtor's expedited motion dealing with approval of the IRS pension funding waiver motion extension. This is filed at docket number 15856. This is, Your Honor, a continuation of matters that have been before the Court on -- two prior occasions we've been before Your Honor dealing with funding waivers involving the internal revenue service and the Pension Benefit Guaranty Corporation.

On those two earlier occasions first, on May 31, 2007, at docket number 8117 and secondly at October 27th of last year at docket number 10726, Your Honor has approved transactions by the debtors in which we entered into with the IRS and the PBGC for funding waivers.

We're back before Your Honor today, pursuant to an order to show cause that Your Honor signed yesterday at docket

number 12865 that was consented to by counsel to the creditors' committee for this special hearing on an additional extension through March 31st of those waivers.

To be clear, Your Honor, we have reached agreement with the PBGC under the terms under which they will recommend to the IRS that the formal waivers be granted. As I think Your Honor's aware, it is the Internal Revenue Service that has the exclusive authority to actually issue the formal pension funding waivers. We are not in receipt of those waivers yet. We anticipate that they'll be received tomorrow or Thursday. We have no indication or expectation that they will not be issued, based on the recommendations made to the IRS by the PBGC, who I believe is participating by telephonic -- in a telephonic conference this morning.

The terms under which these would be extended, from February 29th through March 31st is that the debtors would extend the letters of credit previously provided to the PBGC from March 15, 2008 through and including April 15, 2008. And that we would increase the aggregate amount outstanding, under those letters of credit, by ten million dollars.

THE COURT: And the -- and the trigger for drawing a letter of credit is the -- is what?

MR. BUTLER: Is it would be the expiration of the waiver without the plan being consummated.

THE COURT: Okay.

MR. BUTLER: And, Your Honor, we -- I wanted to say on this record that the debtors are very appreciative of the continued support of the government in eliminating this event risk that otherwise would have occurred on February 29th that would have made it very difficult to consummate the plan. And when I say eliminated, we've eliminated it for the month of February. It moves forward to the March 31 time frame. The debtors have previously said publicly that they intend to emerge from Chapter 11 by the end of the first quarter. That continues to be our target and goal and we are taking the steps necessary, in the debtors' belief to actually effectuate that emergence. So our hope is that we won't need to be back here for further waiver discussions involving the PBGC if we're able to consummate the plan over the next forty days or so.

Your Honor, this was done on expedited notice but as I think Your Honor's aware from last week's chambers conference we have consulted with both our statutory committees pretty carefully in connection with General Motors, with the plan investors. I don't think any of the principal stakeholders have any objection to the relief that we're seeking today.

THE COURT: Okay. Does anyone want to speak to this motion? All right. I will grant the motion. First, as to notice, the significance of the termination date for the present waiver, February 29th, was obvious to everyone in this case. And I think it was obvious to everyone in this case that

the debtor would be working on a potential extension. Certainly, as you alluded to Mr. Butler, the principal stakeholders and parties in interest in the case were aware of those discussions with the PBGC and the Court was made aware of them in your -- in the chambers conference room last week. I've concluded, therefore, that the notice was proper.

Secondly, the price for the waiver, to my mind, is appropriate in light of the limited duration of the waiver and I think that's born out by the fact that the committees and GM have not raised any objection. But it strikes me as an appropriate price and is in the best interest of the debtors and their estates and creditors and shareholders. And I note that the PGBC has acted swiftly and, I think, in a very sophisticated way and that, again, the agreement reached is fair and reasonable. So I'll approve it.

MR. BUTLER: Thank you very much, Your Honor. Your Honor, the remaining two items on the agenda relate to the -- to the cure notices.

THE COURT: Let me just say, you mentioned, and I believe that this is the case, that counsel for the PBGC is on the phone, Ms. Segal?

MS. SEGAL: Hello.

THE COURT: Yes. You needn't stay on. If you want to you certainly can but the rest of this hearing won't involve your matter.

MS. SEGAL: Okay. We will drop off. Thank you.

THE COURT: Okay. Thank you.

MS. SEGAL: Bye.

THE COURT: Bye.

MR. BUTLER: Your Honor, matter number two on the agenda is the non-conforming cure notice motion filed at docket number 12615 that was the subject of an extensive contested hearing last week, and this is the continuation of that hearing and I'll address that in just a moment.

There is, also, matter number three on agenda is the Temic Automotive motion for an order extending time to elect at docket number 12827. Your Honor, indicated they could file that motion by the close of business on Friday. The debtors did not object to that. They did file -- we filed our response and Mr. Berger will be representing the debtors in connection with that matter when we get to it.

With respect to the motion to strike non-conforming cure notices, Your Honor, you may recall that when we were here last week we indicated that there were 314 cure amount notices that were subject to the motion to strike. A hundred and sixty-eight of those notices were the subject of specific objections and I went through them in some detail during the contested hearing last week. A hundred and forty-six of those notices were not contested and therefore those have been included on Exhibit A to the proposed order disposing of -- of

the portion of the hearing that was dealt with last week, that we've presented to chambers and circulated to the parties.

Of the 168 notices that were the subject of the contested hearing, Your Honor gave guidance to the debtors and the parties after hearing argument in the contested hearing. And based on the evidentiary record that was completed last week, that the debtors should review the notices and accept those notices that met certain guidelines that Your Honor placed on the record last week.

We have done that -- completed that review and there are an additional fifty-nine notices that were previously contested that we have now withdrawn our objection to, in accordance with Your Honor's guidance, and those are included on Exhibit B to the proposed order. And those will be -- and the order provides that we will honor those and we're authorized to honor those notices as submitted, notwithstanding the fact that they may have not strictly conformed to the solicitation procedures order or prior rulings of the Court.

That left 109 notices. The 109 notices that are still the subject of this contested hearing are, in every instance, notices that were executed by someone other than the contract counterparty and for which there was no evidence of authority by that counterparty to sign for the -- for the third party to sign the notice provided to the debtors and filed with the claims agent by January 14, 2008. And that, Your Honor,

was three days after the deadline. You had indicated in your guidance last week that you would presume that anything that was received within twenty-four hours, that would be on January 12th vis-a-vis the January 11th timeline. Our deadline was, presumptively, acceptable under Pioneer. And then later in one of your -- in the colloquy on the record, you mentioned the January 14th date, Monday, to actually have gotten that documentation. So we presumed, for purposes of our analysis, that anything we received by Monday, January 14, 2008 in which there was evidence of an authority to act, pursuant to a separate agreement, we did not require it be notarized. We did not -- we listened to each of the items Your Honor indicated.

So as to these 109 notices, another way of saying them, Your Honor, is if we were looking at them on January 12th -- excuse me on January 15th -- on Tuesday the 15th of January, we would be looking at 109 notices signed by someone other than the counterparty for which there was no evidence of authority for that party to have signed them and that's what's the subject of this particular hearing.

We have -- and all of those are listed on Appendix C to the proposed order. So at least, Your Honor, as we talked about on the record last week, our intention had been to present this order to you for entry and that we dispose of, essentially, all of the matters we dealt with last week and preserves, pursuant to the order 109 notices for a Pioneer type

hearing today. The evidentiary record on this matter was closed last week, at the time of the hearing. I think you're going to hear today that there are some parties that have gone out and obtained some new evidence and may want to try to -- and new affidavits and may want to try to introduce them. And we can deal with them as those parties seek to do that.

But, Your Honor, we would like to -- I'll make one other comment about this, by the way. For clarity of the record we talked about -- in the fifty-nine that are in Exhibit B that we have accepted, we had talked about those constituting -- including -- being inclusive of what was viewed as, sort of, last week in the record the seventeen pure parties. Pure -- we called them pure counterparties. They were the seventeen counterparties which had various problems associated with their filing. But both the objection was filed by the counterparty and the notice was filed by the counterparty. And Your Honor may recall that we agreed and Your Honor guided us to accept those notices and -- including accepting the watermark signature -- signatures on the watermarks and other things as it relates to those parties.

When we went back and examined them, over the weekend, and went through all the notices, it turns out that four of those seventeen turned out not to be actually part of that pure group. Four of those notices, in fact, were not signed by counterparties they were signed by claims traders.

So the Methode notices at docket -- which were objections number 12696 and 12710, that notice was actually signed by a representative of Blue Angel. Schaffer, at docket number 12712 was signed by a representative of Contrarian. And Robin Industries, at 12684, was signed by a representative of Silver Point not by the counterparties. So they -- those are included within the 109 today. There was no evidence about that. They weren't -- I just want to make clear on the record that we maintain the principal that the so-called, you know, pure objections -- a counterparty who had signed the notices. Maybe they were non-conforming and timely filed objections, Your Honor had, essentially, guided us to accept those. We did that. It turned out there were thirteen of those, not seventeen.

THE COURT: Okay. Let me just ask you a couple of questions. I -- I didn't see these -- this on the exhibit and I just wanted to focus on it. Clarion Corporation, are they -- have you resolved matters with them or are they --

MR. BUTLER: Yes. Yes, Clarion's resolved.

THE COURT: Clarion's resolved. Okay. And at last week's hearing ASM was represented to have -- in -- in respect of at least most of the cure notices, have filed one with an executed letter agreement from the original contract party, the counterparty. So --

MR. BUTLER: Your Honor, those that were -- those

that had those agreements we accepted and those who didn't, we did not.

THE COURT: Okay. So the ASMs that appear on the -- the chart are -- you -- you've broken out those two groups?

MR. BUTLER: Correct.

THE COURT: Okay. So that where there was an indication of a counterparties authorization filed with the -- with the cure notice within the time frame --

MR. BUTLER: Correct. So, for example, ASM provided some purported evidence of authority on January 17th.

THE COURT: Right.

MR. BUTLER: That was six days after the deadline and three days after the presumptive deadline you gave us, so we did not accept those. That's part of the 109.

THE COURT: But if it came in -- they said it came in, I guess, on Monday or Sunday.

MR. BUTLER: If we had it on the 14th -- anything we had by January 14th was accepted.

THE COURT: Okay.

MR. BUTLER: The bright line we drew, Your Honor, based on all the guidance you gave us was, we accepted everything except those notices for which the counterparty did not sign and we did not have evidence of a third party's right to sign provided to us by Monday the 14th.

THE COURT: Okay.

MR. BUTLER: That was the -- that was, in our mind, the clear bright line. And that left 109 notices for people to come here today and try to convince you that something after the 14th or some other basis --

THE COURT: Right.

MR. BUTLER: -- was acceptable.

THE COURT: All right. So, in some, then, you've -- or the debtors have done their due diligence on the facts as to what fit within my guidance from last Thursday and what didn't.

MR. BUTLER: Correct.

THE COURT: And your charts on the proposed order reflect that due diligence?

MR. BUTLER: They do, Your Honor. And there are only eleven objections left. Ten of them that we objected to. And that would be -- I already talked about Robin Industries and Methode. The Midtown Claims LLC objection at docket number 12708 remains outstanding. Blue Angel, which joined in the Methode one I just talked to you about earlier, remains outstanding. Schaffer Canada I already spoke to you about, remains outstanding. There was some ARGO Partners claim notices at docket number 12719 that remain outstanding.

There are certain objections of Silver Point at docket number 12721 that remain outstanding. Most of them have been accepted now but there are some that remain outstanding. The ASM Capital notices that did not comply, as we've just

described, at docket number 12723 remain outstanding. And certain notices with Contrarian Funds at 12724 remain outstanding.

Those ten objections are the only objections that remain outstanding that have not otherwise been dealt with. And then there is the Temic Automotive one, objection number 12722 which really wasn't an objection because we didn't seek any relief against them. And that was expressed in the motion that is on the docket that Mr. Berger's going to be dealing with separately at agenda item number 3.

THE COURT: All right. Well, let's deal with that one at the end and let me -- let me hear from the parties on the list of ten.

MR. BUTLER: So, Your Honor, with respect to just this order we would move to have the order, Your Honor enter this order which deals with last week's hearing understanding that that means that there's 109 to be dealt with in a separate order today.

THE COURT: Okay.

MR. SACKS: Good morning, Your Honor. Ira Sacks from Dreier representing now nine specific remaining counterparties. Eight that had their notices executed by Silver Point under the assignment of claim and one which was executed by McDermott Will as attorney in fact.

All of those, and it is correct that none of those

had attached at the time, before January 14th, evidence of authority. And we do reserve the arguments we made last week as to why that wasn't necessary.

This has, however, as counsel referred to reduced the amount that is still in dispute with respect to our clients from over 15.3 million down to about 2.15 million.

All of these non-objections that were -- of these nine notices that were sent in were objections to the cure amount. None of them, therefore, made an effective cash versus plan consideration election. And I think that's important, Your Honor, with respect to the pioneer issue because we submit, at least, with respect to that that there's absolutely, to this date, no prejudice to the debtors. And with respect to all of these nine, on February 14 or 15, a fully executed, what we called last week, ratification power of attorney was executed ratifying the notices effective back to January 11th. And that was done as soon as these parties learned that there was some issue which was right after the motion that the debtors made on February 11th.

Your Honor, we don't believe that the issue really is a Pioneer issue. We think the issue is a ratification issue. And -- and we think that the ratification that has been submitted on February 14 and 15 should be effective for the reasons that we set forth in our prior papers. We have, as counsel did refer to, in connection with the Pioneer aspect of

this, because we didn't do this as a Pioneer issue, submitted eight very brief declarations that were filed last night. I don't actually think they're necessary with respect to considering the Pioneer issue but each of them does explain that each of the -- that eight of the nine counterparties, the ones that Silver Point signed on behalf of, believe that since the only issue was objecting to the cure amount, that that was an amount issue where they had ceded authority to Silver Point under the assignment of claim. I know Your Honor has ruled differently about that but with respect to the Pioneer issue.

The -- doing that was in good faith. It explains the reason why they waited until somebody told them they were wrong to fix it. And -- and we do believe that, particularly since the only issue was the cure amount, that both the original election signed by Silver Point or by McDermott Will as attorney in fact, were effective, number one. And number two, in the absence of demonstrated prejudice to the debtors, up to this very moment or surely up to February 14 or 15 when the ratification powers of attorney were submitted, that that passes muster under Pioneer.

Your Honor, we also have some specific comments on the form of order. Does Your Honor want to hear those now or do you want to hold those till after?

THE COURT: No, I'll hear them now.

MR. SACKS: Okay. With respect to paragraph 8 of the

order, which -- which deals with the striking of duplicate notices, we don't have a problem with real duplicate notices being stricken but the way this is phrased it says if that there's more than one cure notice with respect to a particular purchase order or a similar contract or lease. Well, with respect to many of the assumable contracts or leases there are numerous purchase orders listed. As long as we're not talking about striking something that isn't a true duplicate we don't have a problem. But I think the way it's phrased, you could wind up with purchase orders under a single assumable contract which are multiple and legitimately multiple and scheduled by the debtors as multiple, being stricken and we think that at least that language needs to be clarified. The concept we don't object to.

With respect to paragraph 10 of the proposed order, Your Honor, in the even that there is something that our clients will want to appeal, although we don't have a particular problem with the substance of paragraph 10, we would want at least that paragraph of this order subject to a stay pending appeal so that our appeal rights aren't mooted by the rights offering.

And that's all we had, Your Honor.

MR. BUTLER: Your Honor, I mean, as appears in number 8, I mean, it is only that authority that is only for things that are duplicate and the notices -- the purchase orders were

all bunched on the notices, the cure notices. This wouldn't be an opportunity for us to be able to strike individual purchase orders.

MR. SACKS: We were just concerned --

MR. BUTLER: That's not what it says and that's not what we would do.

MR. SACKS: We were just concerned with the phrasing of the or in the -- in that sentence. I'm not suggesting that the debtors were trying to do something untoward, I'm only suggesting that it was open to such an interpretation and we'd like the language fixed.

MR. BUTLER: In our view the language says what it says and it clearly talks about duplicates. It's not -- it's a duplicate -- the authority goes to strike duplicates. It doesn't say we can go strike purchase orders.

THE COURT: Well, if it's an assumable contract with multiple purchase orders it would include all the purchase orders under the contract because you can't assume, in part --

MR. BUTLER: Right. I mean, that's --

THE COURT: I -- I think it's clear.

MR. SACKS: All right. With that explanation on it, that's fine.

THE COURT: Okay. On the other point -- I don't understand, if your clients haven't made an election why does ten even matter, as far as a stay pending appeal?

MR. SACKS: Your Honor, if the -- if the notices are rejected, that has the effect of being forced into the plan consideration basket. If the notice is effective, I'm not going to have anything to appeal. But if the cure notice that we submitted is deemed to be improperly submitted, then we've waived the right to object, as I understand the notice and what's on the notice and the procedure, we've waived the right to object to the cure amount and we get plain consideration. And that's why paragraph ten has an impact on us.

MR. BUTLER: This whole exercise has been about paragraph 10, Your Honor. We need to have a final determination in order to be able to execute the rights offering.

THE COURT: When you say -- I'm still going to back to your statement that your clients didn't elect cash on the form.

MR. SACKS: We weren't -- the form said that if you're objecting to the cure amount skip the election and go to part 3. But the form also -- which -- which is why you never get to the issue of whether you're electing cash or plain consideration, according to the very form we filled out.

THE COURT: Okay.

MR. SACKS: Thank you, Your Honor.

MR. BUTLER: Your Honor, I just -- I just want the record, if I may --

THE COURT: I'm just going to -- I mean, I appreciate we had a fairly lengthy argument on the distinctions that I made last week but doesn't the point you just made highlight why those distinctions are important and why this is really governed by 365 as opposed to 3001?

MR. SACKS: Your Honor, it's for purposes of today, you know, while preserving the arguments that we made last time, we're assuming that it's governed by 365. But we do think, in terms of the Pioneer factors which are the reasons for the delay and the good faith of the purchases, those good faith with contract counterparties -- those people believe that since this only dealt with cure amount and -- that that was something that they had delegated and assigned by -- as attorney in fact and as agent to Silver Point to sign.

MR. BUTLER: Those were non-deligable under the solicitation procedures order.

THE COURT: Well that --

MR. BUTLER: The notices sent to them were very clear they needed to make those decisions. It didn't say call up your friendly claims trader.

MR. SACKS: Your Honor, I understand that that's what Your Honor has ruled and I understand that that's what --

THE COURT: No, but it goes to the Pioneer point too, which is why didn't they get it? Why didn't they understand the notice?

MR. SACKS: Your Honor, you know, it's -- it's different people -- many people have read that notice the wrong way. And -- and I'm not -- and that -- and I think the fact of that and the number of objections speak to that, Your Honor. The number of contract counterparties that read it wrong speak to that. And we have submitted eight declarations on the subject. They're very brief. We think they will --

THE COURT: Are the declarants here?

MR. SACKS: No, they're not, Your Honor.

THE COURT: All right. They're all worded exactly the same?

MR. SACKS: They were slightly different. They were close to the same.

THE COURT: They have different -- different names for the counterparties.

MR. SACKS: No, they -- some of them were changed, some of them slightly and some of the more.

THE COURT: Okay.

MR. BUTLER: Your Honor, the only other point I wanted to make clear so the record's clear on this is, counsel made a good point about how you skip on the form if you object to the cure amount to step 3. And the reason for that is, under the procedures, if somebody objects to the cure amount the default payment -- form of payment for that is cash.

THE COURT: Right.

MR. BUTLER: It's not that they're being -- so all the people -- so to the extent that a claims purchaser decided to check a box that disputed the claim amount, by doing that it automatically was a cash election. And I just want to be clear -- the record's clear on that. It's not that there was a process skipped and the reason for that, obviously, is because if someone's disputing a claim amount we can, for purposes of the -- of plan currency be able to sort out the rights offering calculations that need to be made here. And it's for that same reason that paragraph 10 is so important to the debtors.

THE COURT: Okay.

MR. ZINMAN: Good morning, Your Honor. Daniel Zinman, Kasowitz Benson Torres & Friedman for ASM, Argo and Contrarian. I'll start with ASM if that's all right, Your Honor.

THE COURT: Sure.

MR. ZINMAN: The debtors, earlier, stated that with respect to each of the letters and conformed signature originals. If you might recall, ASM obtained a letter from numerous of its transferors indicating that ASM had the authority and also obtained a countersignature, essentially, next to theirs on a copy of the original with the bar code.

With respect to that package that was sent by e-mail on the 11th and received on Monday the 14th of January, the debtors stated that they are recognizing them. I think that is

not completely accurate with respect to three specific assignee transferors. And they are specifically WXP Inc, where the cure amount, I believe, is approximately 542,000 dollars. Westbrook Manufacturing, Inc., with a cure amount of approximately 23,355 dollars and Viking Plastics with a cure amount of just over 1,000. Each of those are attached to Exhibit D to the declaration of Mr. Wolfe, who is in the courtroom if there's any questions, and those were actually sent in on the 11th.

I might also add --

THE COURT: Well, let's cover -- is that right?

MR. BUTLER: We're trying to check, Your Honor.

THE COURT: Okay. All right.

MR. ZINMAN: And for the record, I -- I stand corrected. Viking Plastic is 15,000, I apologize. But, at any rate, the -- I did try to raise this with the debtors last night with one of their colleagues. Perhaps, you know, there's a short time period between when we received --

MR. BUTLER: Your Honor, we've actually looked, we don't have the evidence he's suggesting so we can look at those three in the recess. Again, we don't have the evidence he's suggesting.

MR. ZINMAN: I'm happy to show it to them at a recess, Your Honor.

THE COURT: Okay.

MR. ZINMAN: We can deal with that separately. And

there was also one that we had thought was in the motion, I guess we can deal with this in a recess as well, that didn't appear to be on any of the schedules to the exhibits to the order. And that would be Syn-Tech Limited. We think there are two claims by Syn-Tech Limited one of which is listed on Exhibit B one of which is not but I'm happy to address that separately and we'll come back if necessary.

THE COURT: Well, but you have a cure notice for both?

MR. ZINMAN: Yes, Your Honor.

THE COURT: Both purchase orders or whatever?

MR. ZINMAN: Yes, Your Honor. I think part of the confusion might have been the name because the letter makes clear that Viking Plastic -- that Syn-Tech changed its name and has an FKA in the letter.

THE COURT: Okay.

MR. ZINMAN: And I'm not sure that they signed it in that fashion.

THE COURT: All right. But -- but you're saying that with regard to those four, you have documents that show the submission not only by ASM within the applicable time frame but also a letter or direction that was also submitted during that period by the counterparty?

MR. ZINMAN: Correct, Your Honor.

THE COURT: Okay.

MR. ZINMAN: Now, there are another fifteen transferors, counting by transferor or cure claim that were received by ASM on the 16th and sent out by express mail for receipt by KCC on January 17th. And there is also two others that were received on January 22nd and January 23rd. And it's those that I'd like to address briefly.

The Pioneer case defines neglect as saying -- the Supreme Court said it encompasses both simple, faultless submissions to act, more commonly omissions caused by carelessness. And by excluding -- by including excusable neglect in Rule 2006 the Court said, "Congress plainly contemplated that the Courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake or carelessness as well as by intervening circumstances beyond the party's control." That's at 507 U.S. at 388.

Your Honor, in the Pioneer case there was a late filed proof of claim. And the excuse given by the -- essentially by the party is advice of counsel. And the excuse given by counsel was, well it was buried in the 341 notice instead of the separate bar date notice so we didn't see it, essentially. And the Supreme Court said, that constituted excusable neglect. And as I'm about to discuss, given that standard, I think that ASM, certainly with respect to the fifteen received on January 17 and perhaps with respect to the other two later would fall within that -- would certainly fall

within excusable neglect.

The procedure -- the Supreme Court said that it was significant that the notice of the bar date provided by the Bankruptcy Court in this case was outside the ordinary course in bankruptcy cases. I think it's safe to say -- I think it's safe to say that this is pretty -- this cure notice process is pretty unusual. The election itself is unusual. There's, kind of, a default settlement, if you don't submit something you default to stock, that seems pretty unusual. The fact that the stock has a materially less value than the cash, if the stock was worth what the cash was worth we wouldn't be here.

The non-existence of any cases on 365 versus 3001(e) and transfer agreements, I know Your Honor has ruled on that, but in terms of just thinking about Pioneer you think about what did -- the reasonableness of what the parties did at the time. ItÆs not like there's a whole body of case law like there would be, for example, with late filed proofs of claim.

The fact that the solicitation procedures order does not specifically address whether counterparty can chose to authorize another on its behalf, nor the issue of the need to provide the authorization, right?

THE COURT: Well, let's just stop on that. First of all, when was the motion for the solicitation procedures served?

MR. ZINMAN: I believe -- actually I have no idea. I

defer to debtors' counsel. Was it September?

MR. BUTLER: No it was served in -- yes, September, the beginning of September.

THE COURT: Okay.

MR. BUTLER: Of 2007.

THE COURT: You've read that motion, right?

MR. ZINMAN: Yes, Your Honor.

THE COURT: Okay.

MR. ZINMAN: Your Honor, to address -

THE COURT: And you read the statement that -- in the order that claims purchaser shall have no rights or recourse against the debtor with respect to the cure?

MR. ZINMAN: Yes, Your Honor. I would submit, Your Honor, that at least with respect to this hearing, ASM has obtained a power of attorney and therefore can act on behalf of --

THE COURT: I'm just talking about confusion. Mr. Shiff didn't seem to be particularly confused when he showed up and argued on -- on the tenth, right?

MR. ZINMAN: That's correct, Your Honor. If -- if you'll bear with me for a minute, I will address that specifically. My point was simply that there's no huge body of case law on -- on this question.

THE COURT: Maybe that's why the debtors went and got an order.

MR. ZINMAN: Your Honor, the order doesn't, for example, provide that the authority by which someone can act as an attorney in fact, for example, has to be provided with the cure notice. That's not in there. So there is some room for some error here. Again, we're talking about excusable neglect. Clearly, in light of Your Honor's rulings that, you know, one can say that there was error. The question is whether it's excusable.

Now the elements specifically, if we could go through the elements of Pioneer, I think they strongly support ASM's position. First of all the danger of the prejudice to the debtor. We're talking about a matter of a few days as to about a million dollars. Those fifteen that were received on January 17th total about a million dollars worth of claims, cure claims. An amount that, I think it's safe to say, is not material to the debtors.

And Your Honor mentioned, at the last hearing, the need for the debtors to prepare for confirmation in light of the timing of all this. One million in cash versus stock is not an issue that I would think would have affected confirmation one way or the other, feasibility or any other way. The debtors were, in fact, already on notice. ASM had provided the debtors with timely signature by ASM on the election notice understanding that Your Honor has ruled that that's not effective. But the point being that -- and ASM had

provided the letters for numerous others so it couldn't have come as a great shock that a few others might trickle in. As to several others, it did take a few days but they, you know -- again, the debtors had some -- should have some expectation that they were coming.

The other -- another element, the length of the delay and the impact in judicial proceedings. The letters and countersigned election notices at issue were received by the debtors on January 17th. The first day of the confirmation hearing, and nearly a week before Your Honor confirmed the plan on the record, the debtors have clearly figured out what claim notices are what and how they apply and to what claims. And this -- I can't imagine that this could ever delay emergence. Of course we still don't know -- parenthetically I might add we don't know whether -- when and if emergence will happen.

Now, another one is the reason for the delay and that gets to the heart of what Your Honor was questioning earlier. And if -- a moment, I just want to go through some -- a few facts quickly as to -- to try and explain that ASM took every reasonable step that it could come up with to satisfy what was required here based on its read of the situation.

On January 2nd or 3rd, ASM sent a letter to all of their counterparties asking their counterparties to contact or the transferors to contact ASM immediately if they receive or have already received an election notice. On January 4, which

is a Friday a week before the deadline, late in the evening, after several weeks of requesting this firm, my firm, finally received a list of what notices were sent to whom.

On January 7, the following Monday, ASM immediately began contacting each of its applicable transferors to try and obtain those notices and have them executed in what it thought was proper. At this point, ASM believed that it had the right to execute the cure notices based on the transfer agreements that it had. In fact the fact that ASM got the original notices with the bar code from the debtors' counterparties does suggest that at least the counterparties agreed that ASM had that authority. And in at least two instances the counterparties insisted that they could not, under the agreement, had no right and refused to execute the original notices.

THE COURT: Where is that in the record?

MR. ZINMAN: I think that is in the declaration, Your Honor, and it was in a footnote, if you'll bear with me one moment. It's footnote number 2 and it refers to Fuji Bank Fukoku South, that's -- as one company and Sigman Cohen Corp. (ph.). There was no case or ruling from this Court at that point that would suggest that ASM's signature, as assignee of the cure claim, with the transferor's consent would not be enforceable. There's no ruling, there's no --

THE COURT: When did the motion to amend the order

start being prepared?

MR. ZINMAN: It was about -- it was about at this time when once -- at this point, when ASM realized that they would have trouble getting all of the forms in on time that we realized that we needed more time to get that done and that's why the motion was filed, not just on behalf of ASM but obviously on behalf of several others.

The primary purpose, the number one purpose was to obtain more time to get it done. We also asked for other relief but that was --

THE COURT: Including the ability to sign the form themselves.

MR. ZINMAN: Correct, Your Honor. When Your Honor ruled that that was not -- that that wasn't going to work, at that hearing, and didn't give us extra time ASM, that evening, immediately formulated the letter and sent it out and got a lot, frankly, within one day to be able to send -- within twenty-four hours wrote the letter, drafted it, got twenty or twenty-one parties to sign it. Several others just took more time. They may not have been available that day. They may have needed to get internal approval within their company which, for some large companies, I'm sure we're all aware, sometimes takes a few days.

And ASM acted with as much haste as was possible to get as many of these in as quickly as possible. Given the

foregoing --

THE COURT: I just -- could we go back to something?

MR. ZINMAN: Sure.

THE COURT: Where is the order confusing?

MR. ZINMAN: Your Honor, it says that the counterparty must sign. It does not say the counterparty cannot delegate or assign the authority to assign on it's behalf to another. I mean, we've all --

THE COURT: Why don't we walk through the order?

MR. ZINMAN: I believe, Your Honor, that we would be focusing on paragraph 43 of the order. The second sentence of paragraph 43 says, "Parties wishing to object to the assumption of their contracts under the terms set forth in the cure amount notice shall be required to return the cure amount notice in accordance with the instructions provided therein so as to be received by the undersigned counsel and the debtors by the deadline."

THE COURT: Okay. And what's ambiguous about that?

MR. ZINMAN: Well, it says parties wishing to object. It doesn't say that the parties can't act -- I mean we've all, as practicing attorneys, on occasion have signed proofs of claim on behalf of some of our clients.

THE COURT: Well, I imagine if -- if one of the contract parties had their attorney sign on behalf of that party, the debtors would accept it. This is a little

different.

MR. ZINMAN: Your Honor, under our agreements, and I understand that -- I'm not trying to re-argue the underlying rule if this goes to --

THE COURT: No, but we're talking about confusion here. I'm just trying to figure out what was confusing.

MR. ZINMAN: Your Honor, under our agreements both -- in each of these cases that we're talking about, both the counterparty, the transferor, and ASM thought that the agreements provided that -- that ASM had that authority to sign -- to fill out the election on their behalf.

THE COURT: But what, in the order, would have led them to -- to believe that?

MR. ZINMAN: I think my point, Your Honor, is there's nothing in the order, specifically, which says that you can't assign the authority. There's nothing in the order that says that there's no power of -- that powers of attorney have to be -- forms have to be provided, you know, along with the notice form. And so there was -- so there was some room here, Your Honor to -- I mean, I understand Your Honor has ruled that the order means something different but this is --

THE COURT: Well, I just want you to explain to me, particularly in light of paragraph 44 which does specifically address claims purchases who obviously, in their proof of claim forms, get powers of attorney.

MR. ZINMAN: Correct, Your Honor. But when you -- there's a -- it's almost like a different hat that you're wearing. When you're acting as a claims transferor -- for example, if the claim transferor did not have a power of attorney -- I'm sorry, the claims transferee, the claims trader, did not have the power of attorney and signed on the behalf, that would be one thing. But in this case they did. And it's -- Your Honor, we are their agent in this respect. And both -- the only person disputing that is not the parties to the underlying agreement but the debtors. Your Honor, the debtors in their opposition that was filed about a week ago argued that this would, somehow, open the flood gates.

THE COURT: Well, I'm still on this point. Let's turn to the notice then which is Exhibit O to the order. The notice was addressed to counterparty, correct, consistent with the order?

MR. ZINMAN: Yes, Your Honor.

THE COURT: Okay. And doesn't it say you must return this form?

MR. ZINMAN: It doesn't say that the you could not include an agent on your behalf, Your Honor.

MR. SAMBUR: Your Honor, I'm sorry to interrupt. Keith Sambur from Richards Kibbe and Orbe --

THE COURT: No, I'm still going through this.

MR. SAMBUR: No, I just didn't want to leave this

point to have to argue --

THE COURT: No, I'm not -- we're not going to leave the point.

MR. SAMBUR: Okay. Thank you.

THE COURT: Let's turn to the next notice, the notice to holders, assignees, transferees and purchasers of claims. What's ambiguous about this one?

MR. ZINMAN: Your Honor, it does not -- it doesn't list it -- there are a lot of -- there's a lot of information that's not in there. It doesn't list which -- it's a blanket statement that does -- that some claims, we're not telling you which ones, may be subject to cures. We're not telling you who, what counterparty or what transferor they would be, what purchase order and we're not going to tell you how much. And it also doesn't seem to specifically address and say that if you are an agent we're not going to respect that.

MR. BUTLER: Your Honor, may I be heard on this point? For the past week the debtors said, Your Honor, that what we want, fundamentally, from this hearing is guidance and a determination what to do and we'll accept it and move on to the rights offering and that is our primary goal here. And so, however you rule on these issues we'll implement them.

But having said that, this particular line of argument is, you know, extraordinarily distressing to the debtors when it comes from the members of the ad hoc trade

committee. The members of the ad hoc trade committee and Mr. Zinman's firm participated in the disclosure statement hearing, were potential objectors, settled with the debtors conclusively on the record of the disclosure statement hearing and approved this order on behalf of all of their clients. This is not a Pioneer type arrangement. This particular set of objectors appeared, participated in the disclosure statement hearing process where potential objectors negotiated a resolution on behalf of all their clients and agreed to the terms of this order and the notices. And for them to come in now and say oh, they should say something else or they could have said something else, all right, is, to the debtors, particularly offensive. I understand parties that didn't do that, but they did. They were there, they participated and they settled. And this Court should not permit settling parties who appeared in front of Your Honor, agreed to a document to now come in and attack the very document that they agreed to. And the reality is that we're here today because the claims trading community chose to ignore Your Honor's order. They chose to ignore these notices. They chose to ignore the plain language that says you, as claim traders, will have no rights or recourse against the debtors. They chose to ignore paragraph 43 and they wanted to do their own thing. Then they came -- then the ad hoc committee, in an act which we thought was, at the time and we told them we thought was

offensive, brought on an emergency motion in January 10th to again try to attack the thing they had settled about and they lost that hearing. And Your Honor overruled them on those issues. And still then they persevered and ignored the order.

That's not Pioneer, Your Honor. That's not excusable neglect. The fact of the matter is that they have known since September 6th that the debtors had identified these as issues, that we asked Your Honor to address them. We spent several months in the disclosure statement process and solicitation process. It culminated an order Your Honor entered on December 10th, this order. They participated in it. They settled with respect to it. They should now be held to it, Your Honor.

MR. ZINMAN: Your Honor, if I may be heard on those comments, briefly?

THE COURT: Okay.

MR. ZINMAN: First of all, when we cut our deal it was with -- to stand down on the disclosure statement and the plan it was with the understanding that the debtors would reconcile claims. We viewed that as including payments made on behalf of or related to claims including cure notices. Now, I understand Your Honor has ruled that that's not a connection, that 365 is different. But it was our understanding, at the very least, I mean, Your Honor, if we had received not on Jan -- late on the evening Friday, January 4th, after weeks of asking, the list of the counterparties. If we had received

that just a week earlier, we wouldn't be here.

MR. BUTLER: Excuse me. You know who your own counterparties are. They're your counterparties; we don't have to tell you who they are.

MR. ZINMAN: Your Honor, further, the accusation that we ignored the order after the 10th is absolutely inaccurate. We -- the evidence shows, at least by Your Honor's rule with respect to seventeen or twenty or whatever the actual number is, that those would be enforceable. And ASM tried everything it could in the twenty-four hours that were had before -- between Your Honor's ruling and the deadline to send something by hand in California, tried everything it could to try and get that done. There was not sufficient time to have the counterparties ask for a duplicate original, have them sign all the duplicate originals and get them in by hand to KCC by -- within twenty-four hours. We did -- ASM did everything that it could within their -- to try and satisfy the order.

THE COURT: I guess my question is why -- why is it really a twenty-four hour issue. It seemed pretty obvious to me that all you needed to do was get an authorization from the client -- I'm sorry, from the counterparty.

MR. ZINMAN: Your Honor, that's what we did. The question is how fast we could get those authorizations? I mean --

THE COURT: But -- but -- I mean it was --

MR. ZINMAN: There was certainly -- there was oral communications in advance of that but, you know, we felt that a written communication would be necessary to satisfy Your Honor and the debtors.

MR. BUTLER: Your Honor --

MR. ZINMAN: And we tried to get those as quickly as possible, as soon as we realized that that was necessary.

MR. BUTLER: Your Honor, the debtors believe that it's patently clear from the order and from the ad hoc committee's participation in this case that at least as the ad hoc committee, and we believe all of these claims purchasers, when this order was entered on December 10th, if they -- if they wanted to keep control of the process and make this argument they were attorney in fact, which frankly, I think, was a high-risk argument to begin with based on the order because it required them coming in and having Your Honor interpret your order to agree that they would get -- it would be more expansive than the actual words. The words of these notices and the words of the order say contract counterparty. You have, and we respect it, expanded that to be a more expansive interpretation. They could not have reasonably relied, on December 10th when you entered this order, that you would do that.

On December 10th these claims traders could have, had they chosen to do it, sent a notice out to all of their

clients, they knew who they were, and said now that this order's entered, which we participated in negotiating, and it's entered -- and it's the order of the case and you're going to get these notices, please give us a letter of direction, please do whatever we're going to do, work all that stuff out. That process started -- could have started on December 10th.

For whatever reason, Mr. Zinman wants to say that the relevant starting date is January 10th after their emergency motion was denied. It was not. It was December 10th. That's when the order was entered. They had actual knowledge of it through their lawyers who agreed to it on their behalf. Presumably Mr. Zinman did not settle the objections on December 10th without the authority of his clients. So presumably they made a reasoned decision to settle their objections on December 10th. And they are bound by the order that they agreed to.

So, from the debtor's perspective this would all have been avoided, frankly all of this would have been avoided had the -- had the claims traders recognized what they were purchasing to begin with when the debtors recognized there was going to be this problem back in September and we put it in the solicitation procedures so it could be addressed head on. Had the claims purchasers decided to honor the order, we wouldn't be here. This is all about non-conformance to the order and trying to convince Your Honor to amend the order after the

fact.

MR. ZINMAN: Your Honor, I go back to what the Supreme Court said excusable neglect or neglect means. It includes omissions caused by carelessness. I mean --

THE COURT: Well, the Second Circuit is -- has put a gloss on that that's pretty clear.

MR. ZINMAN: Your Honor, we're not -- we're not trying to argue, at this point. We are not trying to argue that these actions mean that Your Honor should, under the order itself, allow these cure notices to be enforceable. We're asking for standard under excusable neglect. I'm trying to come up with the reason and the excuses as to why this happened.

THE COURT: Right. And, I guess my issue is I'm still not --

MR. ZINMAN: We were not alone. ASM is not alone, as Your Honor has seen over the last two -- this hearing and the prior hearing, in -- in not getting this order completely right under Your Honor's ruling.

THE COURT: But, you know, let me go back to an exchange that Mr. Shiff and I had during his -- his argument on the 10th. First of all under Section 365, the debtor has to cure all defaults pre and post-petition. Your clients bought pre-petition receivables, right? They didn't know what post-petition defaults there were?

MR. ZINMAN: If I can just confirm that, Your Honor.

THE COURT: I mean, that's what Mr. Shiff said in his -- in oral argument.

MR. ZINMAN: Your Honor, that's correct.

THE COURT: All right. And what was assigned, I've read a number of the assignment forms they all seem to be consistent, is the right in respect of that pre-petition receivable, all of those rights.

MR. ZINMAN: Correct, Your Honor.

THE COURT: All right. But the notice covers cure claims, which is pre and post.

MR. ZINMAN: Your Honor, I'm not actually aware of whether the actual notices at issue here, these fifteen we're talking about, encompassed any post-petition defaults.

THE COURT: Your clients didn't know. Because when we went through this point at oral argument, and this is starting at page 69, Mr. Shiff says, "There's a dispute between the debtor and the non-debtor contract party as to the amounts, the amounts that need to be paid as cure.

"THE COURT: Right."

"MR. SHIFF: The procedures have a process by which that person's supposed to file an objection post effective date."

"THE COURT: Right."

"MR. SHIFF: It gets reconciled and then ultimately,

after a final order, amounts that are reserved on behalf of the claim get paid. So what we're suggesting is this should be treated no differently."

"THE COURT: But what? The transcript submits what? But what do you put in your response to the cure notice. What would your clients put in in their cure notice? They don't know because they only have part of the equation."

"MR. SHIFF: In some cases we don't know."

"THE COURT: So how could they put it in?" And then he, kind of, starts hemming and hawing and says we'd like to get more information from the client. It's not just information about the election it's about the information as to what you actually put in the cure notice. And the only one who really knows that, who has all of the information is the counterparty. And to get it in drips and drabs or just as a guess just, you know, fundamentally doesn't work. It just doesn't work. And that's why, I guess, I go back to my question on a Pioneer analysis, which is why didn't the claims purchasers, either when the original order which is, you know, as Mr. Butler says your clients negotiated. And of course they purchased these claims. That was their function. They were the ad hoc trade committee or the other claim purchasers get on their horse right away and deal with their counterparties about this. It's always been a mystery to me. They know what they bought. They know where their counterparties are. They have

the rights from the counterparties. All they needed to do was get some instructions from them. And yet I'm hearing about this, you know sort of, we don't know what to do Judge we just want more time on the day that the elections are due. It just doesn't -- that to me seems like inexcusable neglect. I mean, why should the debtors and the Court be subject to that when there's -- when there's a full month to get your act together?

MR. ZINMAN: Your Honor, look, we admit that we need -- that we need to work with the non-debtor counterparties on the numbers. Part of the problem that Mr. Shiff was articulating at that time was that we had only just received, less than a week earlier, an exact list of which ones were being assumed.

THE COURT: But you knew who your counterparties were.

MR. ZINMAN: Your Honor, it takes -- we're talking about hundreds of claims. It takes a certain amount of time to -- the cure notices refer to purchase orders which are the debtors' purchase order numbers. The counterparties generally have their own internal numbering system for the same purchase orders; they would do it by invoice number. And it takes a certain amount of time to reconcile those. I think in most cases there really isn't a disagreement as to the amount.

ASM had 350, I'm told, cure claim notices -- I guess claims -- total claims that were purchased that potentially

could have been subject to this. Only a week before we found out which ones. Your Honor --

THE COURT: No, but how many -- how many contract parties were on that 350?

MR. ZINMAN: I think each party had a contract with the debtor. I'm not sure whether --

THE COURT: They were all different parties, 350 different parties?

MR. ZINMAN: If you'll bear with me just one moment, Your Honor. I don't -- I'm told there's about 325. There are a few repeats but generally they're all different.

THE COURT: And when did ASM notify those parties that they better start focusing on the cure amount?

MR. ZINMAN: My understanding, Your Honor, is that most of them were contacted around January 2nd. Your Honor, obviously we would would all --

THE COURT: Someone's -- your colleague is waiving his --

MR. SHIFF: Yeah. No, no, no. I just wanted -- can I correct on the record? I believe the notice went out -- the actual notice went out on December 21st. We received word of the actual notices going out; we immediately started calling our 250 creditors. But you're talking about December 24th starting to call them. So over that holiday week we did reach out to the 350. We wrote a letter to all creditors and

(indiscernible).

MR. ZINMAN: I apologize. Thank you for the -- allowing him to correct the record.

Your Honor, obviously in retrospect it would have been better to do what you're suggesting, that -- it didn't happen and what happened, happened. And we submit that given the circumstances in this case, the amount at stake, the good faith of ASM to try and comply as best as it could, we submit that the debt would constitute excusable neglect in this case. And it's only -- the bottom line is, it's a couple of days.

I do have some other comments to the order, Your Honor. Bear with me a minute, I've got to find it. Okay. Paragraph 7, Your Honor, which states that basically, provides that the debtors are not required party other than the counterparty in connection with the assumption of an executory contract or unexpired lease. That is relief that they're requesting which goes beyond the scope of the motion to strike. The motion to strike strikes instructions attached to certain notices that were sent in that were listed on schedule 1 to the motion and which are encompassed by paragraph 2 -- 3 of the order. None of which affect ASM.

The motion didn't address this issue. The solicitation procedures order says that the debtors are authorized but not directed to pay the counterparties any -- I think saying anything else, at this point, is inappropriate

absent the specific motion on that subject.

THE COURT: All right. But wasn't that covered by paragraph 3 of the original order -- 43?

MR. BUTLER: Yes, Your Honor. I believe it's covered by paragraph 43. And the reason we -- we asked -- we put it in this order and discussed it in our motion to strike is the fact that people wrote in instructions -- the claims traders wrote instructions in --

THE COURT: No, but -- but 43 says the debtors are authorized by not direct to remit and resolve uncontested or adjudicated distributions --

MR. BUTLER: Right.

THE COURT: -- on account or cure to the contract party.

MR. BUTLER: Right. And we dealt with this at the last hearing.

THE COURT: Right.

MR. BUTLER: The fact of the matter --

THE COURT: I don't see why you needed to say it again, is my point. I mean, it was said before and there's no motion for reconsideration and I don't see why --

MR. BUTLER: As long as, Your Honor, there's no question in this record that we are going to ignore those instructions and follow paragraph 43.

THE COURT: Okay.

MR. ZINMAN: Thank you, Your Honor. With respect to paragraph -- bear with me -- 9, there is -- seems to be a bit of an inconsistency here, Your Honor. Paragraph 9 reserves the debtors' rights to make further objections to the notices that are listed on Exhibit B. Yet, maybe I misheard him; Mr. Butler earlier said that we would honor those. I would submit that, you know, if they had another objection, shouldn't they --

THE COURT: No, they don't honor them. They -- this just lets them get into the dispute mechanism.

MR. ZINMAN: I'm actually referring to the election not the -- not the objection, Your Honor. The cash stock issue, putting aside the amount of the cure claim.

THE COURT: Well, why don't you address that?

MR. BUTLER: Your Honor, the point -- we said this, I think, even in the motion, this was -- we -- the motion was intended, when we filed it, we reserved all of our rights except for these, the same thing we do on claims, we reserve all of our rights going forward. I mean, as a practical matter, I don't think we're going to bring another motion to strike. We're going with -- for filing the S-1 and starting the rights offering next week. So it would be impractical for us to do this. But clearly we're not agreeing to the amount, you know, necessarily that the amounts of cure, at the end of the day, are -- if they're inconsistent with our books and records. So it's just a reservation of rights here, I think,

nothing more than that.

THE COURT: Okay.

MR. ZINMAN: Your Honor, paragraph 11 of the order, the last sentence states, "Nothing contained herein shall constitute nor it shall be deemed to constitute the recognition of any cure dispute asserted against any of the debtors." I'm just not completely certain what impact that would have on law of the case or I'm not sure where that -- what that's trying to address. If it's addressing the cure amount, the issue that's open --

THE COURT: I think -- I think it is.

MR. ZINMAN: -- then it should be reserved as to both sides, not just the debtors but also the parties that are subject to the motion. I mean, if it's an open issue, it's an open issue.

THE COURT: Well, it does say that. It doesn't --

MR. ZINMAN: Oh, right. Your Honor, you are correct.

THE COURT: Okay.

MR. ZINMAN: With that -- with that qualification, I'd like to briefly, very, very briefly, I promise, address Argo and Contrarian.

THE COURT: Okay.

MR. ZINMAN: I believe that you will hear from others with similar -- and already have heard with others, perhaps, with similar issues that they've raised. And I understand Your

Honor's prior ruling and we stand by our earlier position and would stand that we can rely on the forms but understand your earlier -- Your Honor's earlier decision and join in the arguments made by others. And would argue that those constitute excusable neglect as I believe others may argue today.

THE COURT: Okay. Well, let me just make sure as to -- I think I have this right but let me make sure. As to -- as far as Argo's concerned, dealt with sixteen transfer claims?

MR. ZINMAN: That's correct, Your Honor. Fourteen are --

THE COURT: Fourteen Argo just -- Argo submitted the notices on its own?

MR. ZINMAN: Yeah, copies. Copies, Your Honor, that Argo created and two were on the original notice forms.

THE COURT: Okay. And --

MR. ZINMAN: With respect to Contrarian, Your Honor, I believe that they were -- all the ones remaining at issue are duplicate forms created by Contrarian.

THE COURT: Which is twenty -- twenty-one.

MR. ZINMAN: I think it's twenty-three, Your Honor. It would be in paragraph 27 of the declaration of Elisa Mimola (ph.) of Contrarian.

THE COURT: Did -- and I forget, did Contrarian attach its assignment forms?

MR. ZINMAN: No, I don't believe so. I think they were on file attached to their 3001(e)s which have been filed, you know, periodically throughout the case.

THE COURT: And -- and Argo did attach its forms?

MR. ZINMAN: No, Your Honor.

THE COURT: It didn't.

MR. ZINMAN: They did not.

THE COURT: Okay. Okay. When I say forms, I mean they didn't attach the assignment.

MR. ZINMAN: Yes, Your Honor. That's what I understood.

THE COURT: Okay. Okay. And on -- on this point -- on Silver Point, for the one that had the McDermott filed, that was filed on behalf of Silver Point, right?

MR. SACKS: It was filed on behalf of Arias (ph.) Your Honor, directly. It was an original form. McDermott was outside counsel to Arias, it filed it for them.

THE COURT: Okay.

MR. SACKS: Silver Point is the ultimate assignee of that but it was not filed by Silver Point. Silver Point was not involved in that.

THE COURT: No, but McDermott -- did McDermott purport to act on behalf of Silver Point or on behalf of --

MR. SACKS: No. On behalf of Arias, Your Honor.

MR. BUTLER: And when we did our investigation with

McDermott, we asked if they were acting as attorney at law, as counsel to the counterparty and they said no, they were acting as attorney in fact. In every instance, Your Honor, where a law firm told us they were acting on behalf of the counterparty as their counsel, we accepted it. That was the distinction here.

MR. SULLIVAN: Your Honor, James Sullivan from McDermott. I'm not -- I don't represent Arais. I know our Chicago office does represent Arais or has represented Arias in connection with the case, for what it's worth. So it has acted as counsel of record on behalf of Arais in connection with Delphi.

MR. SACKS: Your Honor, one other point, and it's very brief. It just -- we did talk about it a lot last time. In connection with Pioneer, I think Your Honor should at least take into consideration the failure to comply with Rule 97 --

THE COURT: All right. Before you get to that point.

MR. SACKS: Okay.

THE COURT: On the other, the ones filed directly by Silver Point, did they attach their assignment?

MR. SACKS: No, Your Honor.

THE COURT: Okay. Remind me again, where is the McDermott filed instruction?

MR. SACKS: It is part of Exhibit I of the objection -- of our objection.

THE COURT: Okay.

MR. SACKS: And with respect to Exhibit I, Your Honor, of our objection, although the assignments are attached as part of Exhibit I, they were not attached to what was actually submitted.

THE COURT: Right. Okay.

MR. ZINMAN: Your Honor, I just -- after we -- after I sat down my colleague -- Mr. Shiff and I conferred and I realized I got it backwards with respect to Argo and Contrarian and I just wanted the record to be clear. Argo filed their assignment agreements attached to the 3001(e)s. Contrarian simply filed the 3001(e)s without the assignment. And neither -- neither --

THE COURT: But it's with the 3001s not with the cure --

MR. ZINMAN: Correct. And neither were sent to KCC.

THE COURT: All right. Okay. Okay. All right. Okay. Other -- other objectors?

MR. SAMBUR: Yes, Your Honor. Keith Sambur, Richards, Kibbe & Orbe appearing on behalf of Blue Angel Claims and Midtown Claims.

I'm not going to go into a lot of the Pioneer factors, which Mr. Zinman has articulately laid out. I just wanted to point out a few differences between my client's situation and those that have already been put before Your

Honor.

Again, to be clear, neither Midtown Claims nor Blue Angel Claims were part of the ad hoc trade committee. We did not join in or appear in that -- that committee's motion which was heard before Your Honor on January 10th. In fact, the cure notices, the original cure notices, that were submitted on behalf of Methode, Palma and Kimball, respectively, were actually received by KCC on January 9th and the record does reflect that.

THE COURT: I'm sorry, go through that again. Say that again?

MR. SAMBUR: Sure. Sorry. My clients had, in fact, submitted --

THE COURT: You don't have to -- we can pick you up without bending over.

MR. SAMBUR: Thank you, it's a lot more comfortable that way. My -- my clients had, in fact, on behalf of Methode, Palma and Kimball distributed cure notices to KCC, the debtor's claims agent. Which, in fact, were stamped received on January 9th and were not part of, in any way, the motion brought before Your Honor on January 10th. They were also not part of any relief requested or any settlement at the solicitation procedures order hearing. And I just wanted to make that clear for the record.

In addition, Your Honor, at this time I just would

like to introduce into evidence some correspondence between attorneys from -- from my firm, including myself, and attorneys from Methode. And in addition, letters directly from Methode, from Palma and Kimball to the debtors evidencing that my client was acting under powers of attorney and authorized agent status. To be clear, these were not submitted with or attached to the cure notices and they were not submitted by the January 4th deadline that Your Honor indicated last week.

THE COURT: Well, January 14th.

MR. SAMBUR: Sorry, January 14th deadline that Your Honor had indicated last week. However, Your Honor, in light of the factors set forth in Pioneer, the fact that in Pioneer there was a twenty day lapse. And because there was no prejudice the Court -- the Court agreed that the twenty days was not prejudicial and therefore the twenty day lapse in filing was not an absolute bar to filing the proof of claim. And because, as I will set forth in a minute, there still exists, to this day, no prejudice to the debtor. We don't -- we see no reason why specific documentation that Your Honor indicated should be accepted by the debtors, could not be accepted -- excuse me, that we submitted to the debtors, prior to today and including today, should not be accepted.

And we do have documentation that we submitted to the debtors on February 4th and February 5th and prior -- February 4th and February 5th indicating that my clients were acting as

authorized agent, attorney in fact. And these were sent by both Methode and Palma to the contract counterparties at issue. If I may present those to Your Honor for consideration.

THE COURT: Are those -- were those part of the evidence that was admitted last week?

MR. SAMBUR: No, Your Honor. They're not. I would just -- I would just note, for your consideration, that again these are communications that took place -- that the debtors are aware of, prior to the date hereof and based upon Your Honor's prior comments at the hearing last Thursday, which indicated that no documentation needed to be submitted based upon a showing under Pioneer. We did not submit those prior to this hearing. I do have copies available for the debtors if they'd like. I'd give them a few minutes to read through them. I'm not, in any way, suggesting that, you know -- I think, again Your Honor, it speaks to whether or not there is excusable neglect here. There are comments, you know, again phone calls made to the debtors seeking to determine the proper cure amount prior to the notices being submitted. Those were made --

THE COURT: Well, wait. That's in these documents too?

MR. SAMBUR: No, no. Obviously not, Your Honor. But there's e-mail to confirm debtors' counsel --

THE COURT: But is that -- where is that?

MR. SAMBUR: It just goes to show, Your Honor --

THE COURT: No, no. Where is that?

MR. SAMBUR: I have the documentation here, Your Honor. Again, I think it just goes to show -- to show --

THE COURT: Well, why don't you -- in the first instance, why don't you show it to Mr. Butler --

MR. SAMBUR: Sure.

THE COURT: -- and I'll consider whether I'll do anything with it or not --

MR. SAMBUR: Sure.

THE COURT: -- but I'd rather see what it is first.

MR. BUTLER: Yeah, Your Honor, I would note that counsel had this last week before the evidentiary record was closed in this contested hearing. I don't know why we're being asked to consider it now at the continued hearing, just having it handed to us in open court.

THE COURT: Okay.

MR. BUTLER: I mean, just -- Your Honor, the point of prejudice, for the claims purchaser to suggest there's no prejudice to the debtors is absolutely wrong. Being in this courtroom right now is prejudicial to the debtors. Having spent two -- having spent days preparing for these hearings is prejudicial to the debtors. There's been a huge amount of cost, expense and attention all because they didn't follow the solicitation procedures order. So to suggest that there's no

prejudice to the debtor or to the Court or to the other stakeholders in this case I think is just plain wrong.

MR. SAMBUR: Your Honor, if I just may address that point while Mr. Butler is considering the papers that I have first provided him.

I think it was Your Honor who suggested that if there was in fact a dispute, that -- that he anticipated that the parties would work it out, out of court. I believe, Your Honor even used the word --

THE COURT: Well, no I didn't -- I said if there was a dispute within the parameters of what I said --

MR. SAMBUR: Sure.

THE COURT: -- they should work it out, they should work it out.

MR. SAMBUR: Sure.

THE COURT: They should perform their due diligence and --

MR. SAMBUR: Sure. Agreed, Your Honor. And I think the documentary evidence that I'd like to submit shows that, again, both Palma and Methode tried to work that out with the debtors and Kimball tried to work that out with the debtors out of court. They suggested -- they asked what documentation the debtors would like to see. They told them that they had this documentation. Where should we provide it? What would you like to see?

THE COURT: IÆm sorry. You're, kind of, mixing apples and oranges here. Are you suggesting that the documents that you just provided to Mr. Butler go to show that your clients cure notices fall within the category of what I said I would in all likelihood grant a -- a Pioneer request?

MR. SAMBUR: Your Honor, you targeted the deadline of January 14th. Admittedly documents were sent on February 5th and February 4th which evidence both Palma and Methode's --

THE COURT: Okay.

MR. SAMBUR: -- indication that my client was acting as an authorized agent, attorney in fact and ratified that.

THE COURT: Okay.

MR. SAMBUR: We're just seeking to extend that January 4th deadline to include this documentation which the debtors were previously in receipt of.

THE COURT: Okay. I understand that.

MR. SAMBUR: Thank you, Your Honor. Just --

MR. BUTLER: Your Honor, just so we can take care of this. I mean, I don't know what other people are going to try and submit evidence but if Mr. Sambur thinks this is important to his case, I'm not going to stand in the way of this being put into evidence. It would be marked Exhibit 44.

(Communications submitted by Mr. Sambur were hereby received as Exhibit 44 for identification, as of this date.)

THE COURT: Okay. That's fine.

MR. SAMBUR: May I present a copy to Your Honor?

THE COURT: Sure.

MR. SAMBUR: Thank you.

MR. SACKS: Your Honor, may I recall before that the debtors' object to the declarations we filed last night?

MR. BUTLER: Yeah, I do object to those because they created them over the last -- between the time of the last hearing and now, Your Honor. I mean, I think that's different.

THE COURT: I --

MR. BUTLER: They manufactured the evidence over the last four days.

THE COURT: I -- I agree. And the declarants aren't here. I mean, my rule is to take declarations when people are here to testify. And I would want to hear from them as to their confusion and their beliefs. And it's just a statement that is not subject to cross examination and it's wasn't even -- I mean, and it was made after the fact, in light of, I think, the hearing on the 21st.

MR. SACKS: Your Honor, the reason that it was made after the fact -- and I understand Your Honor's ruling. The reason it was made after the fact was, we did not view this, as I said this morning, as a Pioneer --

THE COURT: No, I understand but they -- but, I mean, I think that -- and that's fine. But if -- if they're being offered into evidence for Pioneer purposes I would want to have

the parties have an opportunity to cross examine the people as to why they felt that they were confused. And why -- what, you know, the basis for their belief. And these are all legitimate questions under Pioneer and I would ask them if -- if no one else did. So, I -- I can't --

MR. SACKS: Your Honor, given the accelerated nature of this where we didn't get the final list of whose declaration they actually needed until 4:15 this morning. I think that's -- I think that's unfair but I understand Your Honor's ruling. Not a single declarant whose declaration was put in at the last hearing was here to testify.

THE COURT: No one asked to cross examine them. Okay.

MR. SAMBUR: Thank you, Your Honor. Just to review -- to go back, I know Your Honor had spoken about ambiguity earlier and I just wanted to raise two points in relation to my client before moving on to the specific documentation and issues of prejudice. The first point being that, again notwithstanding Your Honor's prior ruling with respect to paragraphs 43 and 44 of the solicitation procedures order. Again, Your Honor, my clients were acting under the belief that their powers of attorney set forth in their purchase agreements did, in fact, provide them with the necessary authority to submit the documentation on behalf of the contract counterparties.

THE COURT: Did they really think -- I mean, where's the evidence that they even thought about it?

MR. SAMBUR: Again, Your Honor, these were pre-petition claims. And as it set forth on the actual cure notice --

THE COURT: No, but where -- where's the information that they even thought about this issue? I mean, where's the -- where's the evidence that this issue was even something that they even considered?

MR. SAMBUR: Again, I believe it was not just -- not just my client but the actual contract counterparty who sent the notice to my client believing that it was actually my client's duty and obligation. And because the proceeds that were going to be paid --

THE COURT: And that's -- and that's based on -- on what in the record -- is it -- am I right, your clients submitted the original forms with the bar code?

MR. SAMBUR: That's absolutely correct, Your Honor. They submitted original forms with the bar code that they received from the contract counterparties themselves after conversations with those contract counterparties about the appropriate course of action.

THE COURT: Well, no, wait. Is that in the record?

MR. SAMBUR: No, Your Honor. Other than -- no, Your Honor, we've submitted no evidence as to that, again, other

than the fact --

THE COURT: You're asking me that I confer that since it was sent to them --

MR. SAMBUR: Yes.

THE COURT: -- that they -- that --

MR. SAMBUR: Yes.

THE COURT: -- there must have been some reason, some meeting of the minds as to why it was sent.

MR. SAMBUR: Sure. And other -- other than the fact, Your Honor, that an attorney from Methode, Mr. Tim McFadden, did appear in court on the hearing on Thursday. Flew in from Chicago and stated on the record that our clients did confer and that my client was an authorized agent and attorney in fact with respect to this cure notice. In addition, Mr. Chappell Philips was also -- appeared telephonically during the hearing, would have -- would have indicated the same had he ever been asked the question. Again, there is -- I have plenty of -- again, I've got a number of documentation back and forth, phone calls, etcetera, with these various parties indicating that, again, my client was acting as an authorized agent, could not determine the appropriate cure notice and simply rejected the cure amount in order to give the --

THE COURT: Well, let's -- let's go to that point again.

MR. SAMBUR: Sure. Again, I think this points out an

ambiguity in the -- in the notice.

THE COURT: They couldn't -- I'm sorry, they couldn't -- when you say they couldn't determine the appropriate cure notice, what do you mean?

MR. SAMBUR: The cure notice was received and it set out, as explained by counsel previously, a number of purchase orders.

THE COURT: Right.

MR. SAMBUR: Up until -- actually, I spoke with Methode's counsel before Thursday's hearing, he was just able -- their client was finally able to reconcile their own internal numbers versus the purchase order schedule by Delphi because from what I understand, Your Honor, the purchase orders that were actually scheduled listed -- were internal reference numbers and were not readily identifiable by the contract counterparties. We -- we -- actually their first e-mail that I included in my exhibit evidences phone calls that I had identifying myself as a purchaser of this claim, owning the claim number, contacting debtors' counsel in order to attempt to reconcile this cure amount. That could not be done within the time period to return these notices. We, in fact, contacted the contract counterparty after that and after receiving instruction from the debtor that they would probably recommend filing -- filing a rejection in order to give the parties time to sort out the correct amount.

MR. BUTLER: I'm sorry. Who are you saying made a representation to you as to how you should make a determination?

MR. SAMBUR: Mr. Matthew Gartner (ph.). And, you know, just for the record, in no way indicating that -- that Mr. Gartner or any other member of the law firm -- of Skadden Arps representing the debtors is not forthcoming. It's just that, Your Honor -- and did not attempt to work with us at all.

MR. BUTLER: Do you have any evidence about that? Because that's not what your exhibit says. Do you have any evidence to that allegation?

MR. SAMBUR: I have an old voicemail that I do not have here. If you object to it then it could be stricken from the record.

MR. BUTLER: I object.

MR. SAMBUR: I think -- I think this evidence, though, sets forth my state of mind -- the declarant's state of mind after those follow-up conversations. And again, no response saying you're not -- you're not permitted to submit these, I cannot answer questions for you.

THE COURT: Well, wait. There's a -- there's an e-mail here to you, of course it's January 21.

MR. SAMBUR: Yes, Your Honor. In response to an e-mail by another associate in my firm, Casey Boil (ph.). He was following up and the associate from Skadden indicates that

they cannot, necessarily, confirm that the notice would be processed and accepted. He says it must generally be made by the contract counterparty unless there is a valid power of attorney or other authorization attached to the notice.

THE COURT: Authorizing --

MR. SAMBUR: Authorizing another party to execute the form. This would be a case by case analysis. As soon as -- Your Honor, as soon as we received that e-mail repeated phone calls were made to the debtor. I would note that there's a sixth day lapse between their response to my -- to my associates inquiry and the debtor's response.

MR. BUTLER: Right.

MR. SAMBUR: Immediate phone calls -- and I understand that they were in preparation for the actual confirmation hearing, which was incredibly important; I'm not trying to downplay that. I think, Your Honor, it just goes to, again, why we have not submitted -- why we had not submitted documentation prior to February 4th and February 5th, which was as soon as this e-mail was received, phone calls to debtors' counsel, again, trying to determine what documentation they wanted, indicating that we could provide it. We believed it was effective when we submitted the notice. Again, follow-up e-mails on January 31st -- excuse me, January 30th and 31st, again attaching the actual cure notices asking what could be done. Indicating to the debtors that we did in fact believe

that we were acting under authority in our -- you know, we had authority to act and would provide appropriate documentation just asking what was required which culminated, after that, in a February 4th and February 5th letters sent by Palma and Methode, respectively. Again, affirming -- what we believe was affirming and ratifying my client's actions.

Again, there was follow-up e-mails and phone calls after that again asking the debtors what position they were going to take, if we could enter into any form of stipulation, what documentation could be provided. Again, I think this goes to two facts, one, our attempt to provide the debtors with the documentation that they wanted and two, speaks to our good faith belief that when we submitted these cure notices we were acting under -- properly acting under the Federal Rules of Bankruptcy Procedure which were not mentioned or there was no indication that you could not act under those under the solicitation procedures motion or order. Those also were not in the cure notice. It stated nowhere in the cure notice that Federal Rule of Bankruptcy Procedure 9010(a) would not apply. And my clients did, in fact, have a good faith basis for submitting the cure notices on behalf of Palma, Kimball and Methode without providing documentation.

THE COURT: Well, I -- let me -- let me ask you about that because looking at the notices they're all signed by Midtown Claims or Blue Angel Claims, as the case may be, as

assignee of not as attorney in fact for or attorney at law for -- well, it wouldn't be attorney at law for -- attorney in fact for these parties; they're all signed as assignee for.

MR. SAMBUR: Understood, Your Honor. But I believe that the documentation that we've subsequently provided within -- within, I believe, an acceptable time period in accordance with Pioneer, did provide proper evidence that my -- my clients were acting as attorney in fact and authorized agent for these parties. And again -- again, I just go back to the solicitation procedures order which, again --

THE COURT: Which said assignees don't have any rights.

MR. SAMBUR: It said that claims purchasers have no rights or remedies with respect to any monies that were going to be paid on behalf of the cure notice. Again, I think there's two different hats here. When my client was putting on, sort of, the hat of authorizing --

THE COURT: When they actually signed the form.

MR. SAMBUR: They were signing as attorney in fact, authorized agent.

THE COURT: That's not how they signed it.

MR. SAMBUR: Your Honor, admittedly, I think that they could have been a little bit clearer. But again, I think that just goes to -- I think --

THE COURT: Yeah. I think that that's a fair

statement since they signed exactly in the opposite capacity as the one you want them to sign in --

MR. SAMBUR: Again, I think they did provide documentation. Again, I believe they're failure to sign as attorney-in-fact could be classified as carelessness under the circumstances. And I would just pause at that. Again, within an acceptable time period as set forth in Pioneer, they did in fact provide documentary evidence that they were acting as authorized agent and attorney-in-fact. And if the solicitation -- again, just going back to their good faith and --

THE COURT: Is it your client's view that they read the solicitation procedures order and were confused by it or they didn't read it at all?

MR. SAMBUR: No, not at all, Your Honor. I think this is a case where they looked at the cure notice. And again, this is a point that hasn't been paid so before I answer, I just want to make this one point which is the cure notice -- the solicitation procedures order was not disseminated, not attached to the cure notice. And I do not believe that actually the parties that were receiving a cure notice had appendix to that, the solicitation procedures order. And if that was so vital, if that was so pivotal in interpreting the actual notice, then I think one would anticipate -- and again, going back to cure -- back to Pioneer

of what is normal, what is ordinary, this was not an ordinary process. And if this solicitation procedures order was so critical to interpret any of this notice and submitting it correctly, it should have been attached to that. So that when my client actually received the notice before it took any action, it would have been forced to confront the solicitation procedures order. Nowhere on the solicitation -- excuse me, on the cure notice does it state you should read -- you know, you should read carefully the solicitation procedures order. It indicates that the notice was approved in connection with it. It indicates the docket number. But it doesn't go to far as a ballot which says you should carefully consider the solicitation procedures order. You should carefully consider the plan which, again, clients were being asked to contemplate receiving this amount in stock as opposed to cash even though they didn't receive these documents.

THE COURT: Well, but does the notice --

MR. SAMBUR: And again, I think that created some ambiguity.

THE COURT: Does the notice have any election form on it that your clients got?

MR. SAMBUR: Again, my clients were forwarded original notices.

THE COURT: But the notice they got didn't have an election form?

MR. SAMBUR: They did, in fact, receive a separate notice, Your Honor. But again, they were acting under these notices as attorney-in-fact. And that notice that they received, the Exhibit P -- again, I have no indication that the solicitation procedures order was disseminated along with that notice as well. And again, it goes back to the prior point which is if this was so pivotal, then it should have been included. And it wasn't.

THE COURT: Okay.

MR. BUTLER: Your Honor, in response to just a couple of observations. One, the solicitation procedures order was sent to all creditors in this case and all of them got that. Every one of the counter parties received the solicitation procedures order and had it -- and it was sent out in connection with the solicitation procedures as Your Honor required. So they all had it.

THE COURT: Because it was for the disclosure statement.

MR. BUTLER: Exa -- it was with the disclosure statement. It was also sent to every creditor in this case and every stockholder in this case received the solicitation procedures order, the actual order itself. Mr. Sambur is just plain wrong.

Number two, with respect to the notices they received, again, we are here. The entire Exhibit 44 -- I

believe it's been marked now 44, Mr. Sambur's package, which begins with exchanges between his firm and colleagues in my firm and which, as Your Honor notes, that they were told -- and these are all for the most part after the fact notices. The only part of this is a reconciliation e-mail back on January 4th. But in terms of the attempt by them to mitigate the fact that they had not filed the solicitation procedures order, these documents -- you can see, Your Honor, they keep moving the story. They signed document -- they signed the claims and filed them as assignee. There's no evidence about the circumstance in which they procured the originals from their counterparties. But in violation of the solicitation procedures order, they procured them from the counterparties, they signed them as assignee -- that is the only thing before the Court as evidence. And then you go through this package and by the end of the package, you have -- there are letters dated in February from some of the outside law firms to me, in fact, saying gee, I should consider the fact they were authorized after the fact. And then finally, the final set of documents here are affidavit -- powers of attorney that were executed on February 25th. You know, today's the 26th. They were executed yesterday. So they were manufactured in the middle of this hearing. I mean, you know -- now admitted into evidence. I don't know what effect that power of attorney has that was signed -- that was introduced after the evidentiary

record in this case was closed. It comes right down to the fact -- all of this comes down to the fact that this issue, the distinction between Section 365 of the Bankruptcy Code and claims purchasers' rights or interests as they acquire pre-petition claims was an issue that the debtors identified with other parties-in-interest and with their statutory committees last summer. And we prepared the solicitation procedures package, we prepared the motion seeking to move forward with this, we recognized these issues, we called them out, parties-in-interest received notice of that process, including Mr. Sambur's clients, during the course of the solicitation procedures hearing because those notices were very widely disbursed of the motion back on September 6th, again, to all parties-in-interest in this case. And these notices were approved by Your Honor. And they're very clear on their face. All of the arguments here that have been made by all of these counsel are made because they want Your Honor to ignore the plain language of paragraphs 43 and 44 of your prior orders and to ignore the notices that were put in place. What Mr. Sambur's clients should have done is when they consulted, as he's testified, because he has no evidence to back it up -- as he's testified that there were consultations between his clients and the contract counterparties, what they should have done is what some others did. They consulted and the contract counterparties submitted an appropriate notice which is what

the solicitation procedures order dealt with. Remember, we're dealing here now, out of 1700 notices we sent out, we're dealing now with a hundred or so that, after Your Honor's prior guidance, that are clearly not conforming. And they are not conforming because claims purchasers chose at their own expense and risk to ignore Your Honor's order. They chose to do it another way. And now they've come in and said oh, but for this, but for that. And now we're talking excusable neglect. How is it excusable neglect to blatantly and intentionally violate a federal bankruptcy court order? I just don't get it, Your Honor.

THE COURT: What should I take away from the fact that Midtown and Blue Angel submitted the bar-coded form?

MR. BUTLER: Clearly, Your Honor, you can take -- there was an unsubstantiated conversation between the counterparty and Blue Angel where that form ended up in their hands. That -- and there was only one original bar-coded form, original form. But that is not evidence, Your Honor. I believe the fact they have that -- the inferences are sufficient to say that they had the authority to interfere with the 365 relationship. I don't believe there's anything in the order that authorized the counterparty to do that. You know, we have moved so far away from what the order was that dealt with solicitation procedures which basically said 365 counterparties have to deal with these notices and claims

agents have no direct rights but we'll give you the courtesy of knowing so that you can consult with your counterparties when they submit the notice. That was the formulaic approach to this on December 10th at the solicitation -- when this order was entered and on September 6th when we procured the motion, when we filed the motion seeking the authority. Because we recognized this issue. And this is not -- as the evidence in the January 10th hearing indicated, and we put evidence in the record and Your Honor is aware of it, this is not a new issue. There have been commentators that have written about this specific issue and the risk the claim purchasers take when they purchase accounts receivable that are associated with long term agreements that then get assumed. Because what happens under the law is you cure under 365 and you move to strike the claim and the claim is stricken from the claims register by separate motion. That's the procedure. And they have bought something that has no value. That's their risk. All right? That's their risk. And their obligation is to deal with their counterparties on that. It's not to put the debtors through the kind of process we've now been subjected to which we've tried to avoid by anticipating this in advance in getting a very clear order and direction from Your Honor on December 10th.

MR. SAMBUR: Your Honor, two observations with respect to the question you just asked Mr. Butler. One, with

respect to Silver Point and McDermott, they submitted the original forms also with respect to the Silver Point counterparties that Silver Point signed for and the McDermott Araias form. And I think Your Honor's question with the -- the answer to Your Honor's question is somebody thought that was the right way to do it. And there's no -- and I understanding there's nothing in the record as to whether it's the counterparty, the person who signed or both. But somebody thought that was right. And the election itself was very -- and what was happening, what was chosen by the counterparty and the signature was very clear and has since been ratified or made plain.

MR. SACKS: And I just want to speak --

MR. BUTLER: I'm sorry. Let me just finish one thing. I want to deal with the McDermott Will issue, Your Honor. We have -- there's been a statement made on the record by a partner at McDermott Will that they in fact represent this -- the counterparty. And I respect that statement. If, in fact, they -- and I think Your Honor, based on that statement, can draw the inference that they were acting as attorneys at law not attorneys-in-fact on that. It was our practice that if an attorney representing a party executed on behalf of the party, like a pleading, this form, we would accept it. So based on that representation on the record, the debtors I don't think have any issue with that particular

Silver Point form.

THE COURT: Okay.

MR. BUTLER: Because I think that, you know, there's an enormous difference between someone acting as counsel --

THE COURT: Counsel for Silver Point as opposed to counsel for the --

MR. BUTLER: Right. That's a different issue. That was a different issue. When, you know -- we had our exchange last week about Silver Point's counsel appearing on behalf of all these other folks. That's quite different than someone's traditional lawyer and I accept the representation by a member of the McDermott firm that they, in fact, represent the counterparty and have for the purposes of this case.

THE COURT: Okay.

MR. SAMBUR: Your Honor, if I could just

THE COURT: Sure.

MR. SAMBUR: -- address some of those points that Mr. Butler had just made. First, with respect to the issue of commentators have written extensively on the subject and that my clients should have known that they were not purchasing these cure amounts, I think when you actually read the commentator -- this is just --

THE COURT: But I don't think you have to -- I guess that issue, to my mind, is a very secondary issue because the order says what it says and the forms say what they say. And I

just -- it seems to me that people were taking a real chance, a big chance, by not following them. That's what I just don't understand here. And I think that there is certainly a potential here for optionality on this point.

MR. SAMBUR: I think, Your Honor, that --

THE COURT: If the stock had gone up as opposed to down then you're covered by the counterparty that didn't object and therefore gets the stock. Whereas, if the stock goes down and you'd rather have cash, you're covered by the claims purchaser 'cause now there's an objection and the claims purchaser gets cash. So, I mean, it just seems to me that it is very convenient to not pay attention to the orders.

MR. SAMBUR: Again, Your Honor, I just think that with respect to what the commentators write and it goes to the good faith -- a good faith --

THE COURT: No, but I'd like to address the other point. I still don't understand -- did you read the order?

MR. SAMBUR: Yes, Your Honor.

THE COURT: When it came out? I mean, before the deadline?

MR. SAMBUR: Your Honor, I was not sent a copy of that order. I reviewed the notice. And again, looking at the order, I did not have any indication to believe that Rule 9010 did not apply and that my clients could not act as attorney-in-fact or authorize the agents. And under 9010(a) -- and again,

this actually buttresses the point that the debtors had made which, again, contract counterparties were not creditors. These were not claims. 9010(c) didn't apply. 9010(a) applied but no evidence was necessary. That was the -- sort of direction that we -- that's what we read from the procedures, from the notice itself. Had it been clear on there that actual prohibition which said only contract counterparties may return this form. Then obviously we would have sent back this documentation at the very last -- you know, prior to the deadline through the contract counterparty and said you have to fill this out. Thanks for sending us the original but you have to fill it out. The point is also that faced with the deadline, faced with what the debtors considered --

THE COURT: You know, there's a lot of case law that says -- and that's why they have the exception in 9010 for proofs of claim, balance -- there's a lot of case law that says that filling out a proof of claim is an act constituting the practice of law. And I would think perhaps objecting to a cure claim would also be one. So why does 9010(a) so clearly apply?

MR. SAMBUR: Again, Your Honor, I don't think today we're addressing why it applies or my clients --

THE COURT: No. But we're addressing what people would reasonably think.

MR. SAMBUR: Sure. Again --

THE COURT: I mean, again, you have Mr. Shiff's

point. You're responding to a formal notice, that this is what we believe a cure claim is, setting up a litigation. And just to sort of willy nilly say well, I don't know but I'm going to object.

MR. SAMBUR: Sure.

THE COURT: You know, how should a non-attorney named Blue Angel have the right to do that under 9010(a)?

MR. SAMBUR: Again, it did not believe that this was considered the authorized practice of law by submitting this documentation.

THE COURT: Even though it establishes the framework for an objection over litigatable issue.

MR. SAMBUR: I think, Your Honor, again, going back to the actual cure notice, it did not require any substantive pleading. And here's, I think, where part of the confusion was. It said if you reject the cure notice thirty days after the effective date, you will have to file a substantive pleading with the Court stating with particularity why, in fact, you object. And I think that would have obviously been construed as the practice of law. But completing this cure notice, which was a general election, which again, as Mr. Zinman pointed out not ordinary course, even for mega cases, which required a derivation from the general rule that administrative expenses must be paid in cash, the cure amounts must be paid in cash. There was going to be a derivation to

that and it was put forth via negative notice. And I think when you factor all these things in, I think there was ambiguity. It was formed on a basis of good faith. And my client subsequently attempted to provide documentation. And again, as Your Honor points out -- pointed out last week, there are some parties that didn't submit originals. There's other parties that just today have evidence that they were acting as attorney-in-law, that they were not the actual contract counterparty. And there's inconsistent results being applied. And I think that speaks to the ambiguity. And just as there was no prejudice last week when Your Honor indicated that the debtor should accept non-originals, there still exists no prejudice today. This order will not even go final until ten days from today. So I don't see what the harm is in going back to the February 4th and February 5th letters or even the letters of yesterday, the powers of attorney ratifying the prior acts as there has been no prejudice to date.

THE COURT: How are you and Palma and Methode intend to deal with the contract assumption issue?

MR. SAMBUR: If there is cash received or subscription rights received -- and, again, I think this goes to a point to cure notice and a point earlier about the ambiguity which was the cure notice stated that these were only for pre-petition arrearages which was clearly purchased in the documents. We're not talking about any post-petition defaults.

We're clearly talking about pre-petition receivables that were subject to cure. And that's, again -- that's why, I think, this clearly fit within our power of attorney and why my client believed it fit within the power of attorney.

THE COURT: What -- I don't understand.

MR. SAMBUR: I believe, Your Honor, that there is a question raised as to whether or not these were payments due for post-petition purchase orders or post-petition amounts that were past due and whether we could separate those from what my client purchased and what was actually due for post-petition transactions. These amounts that were on the cure notice were only for pre-petition arrearages and clearly fit within the definition of "claim" under our purchase agreement which, again, led to the belief that --

THE COURT: But how does the debtor know --

MR. SAMBUR: Again, I think --

THE COURT: -- that the non-response is going to cover both types of objections, pre and post?

MR. SAMBUR: There was no post-petition covered by this.

THE COURT: The debtor doesn't know. That's the whole point of the notice.

MR. SAMBUR: The debtor stated in the notice that it only --

THE COURT: I know. And the party has the right to

object.

MR. SAMBUR: Sure. And that -- the party who was going to object was Methode, was Palmer, was Kimball. Once they determined what the actual amount was. But we never even got to that step of what we believe was even electing cash or stock because, as the debtor admitted, that was an ambiguity in the notice. And we never got to the point of even filing a substantive objection.

THE COURT: But I guess that's the point. It didn't know what the amount was so it just objected. But it didn't object; it let its assignee of the pre-petition amount object. So how do we know how to reconcile that in the future? You're saying -- there's a general objection, right, to the cure notice?

MR. SAMBUR: I would characterize it again as a rejection to the cure amount --

THE COURT: Right.

MR. SAMBUR: -- that the parties who did not attend --

THE COURT: Okay. There's a rejection to the cure amount.

MR. SAMBUR: Yes.

THE COURT: And the proof of -- the power of attorney goes to the pre-petition amount, right? So who's rejecting -- and how does the debtor know that the rejection is just as to

the pre-petition amount?

MR. SAMBUR: This notice only covered pre-petition amounts, Your Honor.

THE COURT: No, it does -- why do you say?

MR. SAMBUR: It says in the cure notice specifically that the notice is only with respect to pre-petition arrearages.

THE COURT: Where?

MR. SAMBUR: Sorry. Let me just --

MR. BUTLER: No. Your Honor, I will point -- on para -- if you look at paragraph O in -- the actual cure amount on the notices does reply to the pre-petition amount.

THE COURT: But that's what the debtors say it is.

MR. BUTLER: Correct.

THE COURT: But the notice gives you the opportunity to object to the amount pre or post, doesn't it?

MR. SAMBUR: Absolutely it does not, Your Honor.

THE COURT: It doesn't?

MR. SAMBUR: And the procedures set forth in the -- if you look -- underneath the box, Your Honor, it says "The debtors' records reflect the amounts owing for pre-petition arrearages as set forth on Schedule 1" which is defined as the cure amount. Which means they were only talking --

THE COURT: I'm sorry. What are you reading off of?

MR. SAMBUR: Sorry. The box on the front page of the

cure notice. Underneath that box, the first sentence says "The debtors reflect the amounts owing for pre-petition arrearages" --

THE COURT: I'm sorry. Are you reading from Exhibit O to the --

MR. BUTLER: Correct, correct.

MR. SAMBUR: Correct. Sorry, Your Honor.

MR. SACKS: And he's correct. Near the bottom, Your Honor, Schedule 1 is the cure amount.

THE COURT: Oh, right. Right.

MR. SAMBUR: Yes, yes. And you define it as the cure amount.

MR. BUTLER: Yeah.

MR. SAMBUR: Step 1 says "Do you agree with this cure amount or not? Yes or no." If you disagree, you skip step 2 and go to step 3 which indicates that you must file an objection with respect to the cure amount. It's only speaking with respect to the cure amount. It's only speaking with respect to pre-petition arrearages. The following paragraph at the end, right above step 4 on the last page, Your Honor, page 3, it says if there is a dispute regarding the nature amount of any cure, the ability of reorganized debtor to or any assignee to provide adequate assurance or any other rights with respect to this cure notice, that it's sep -- you have a right to bring an objection separate and apart from this notice. This notice

was only with respect to pre-petition arrearages. It was only with respect to the receivables that my client purchased that the debtors were aware they purchased. And they've acknowledged they purchased both through the filing of 3001(e) and through their Exhibit P.

MR. BUTLER: Your Honor, the notice that was sent out with respect to the pre-petition amounts is because that's what the debtors believed was the only thing amount owed. Does not mean that the 365 party would not have a different view. I mean, the -- what Mr. Sambur is trying to do here is go back and separate these notices and the order from paragraph 43 which, basically, was very clear, is not ambiguous. And, you know, Mr. Sambur can make whatever argument he wants. He shouldn't construe -- I never said on this record that these notices were ambiguous which is what you said in your argument a few minutes ago. The debtors do not believe there's any ambiguity in these notices whatsoever. And I explained to Your Honor earlier the reason you skip step 2 if you object to the cure amount is because the -- it goes into the process where there's only a cash determination because it's decided later outside of the rights offering. There is -- you know, we keep going round and round and making every argument we can. Mr. Sam -- neither Mr. Sambur nor any other party can get away from paragraphs 43 and 44 of your order, Your Honor, which are not ambiguous. They are clear. We can go back and read the words

of paragraph 43. You can read the words of the notice. You means you. You doesn't mean somebody else. When paragraph 43 says that the counterparties to supply contracts will act under paragraph 43, Mr. Sambur seems to think that what we need to say is it's the counterparties and then list all the people it can't be. The order says the counterparties. And such parties. Not the assignees of such parties. And his clients are the assignees of such parties.

THE COURT: Okay.

MR. SAMBUR: Again, Your Honor, I think just -- just goes back to good faith. You meant you, did not exclude assignees, did not exclude powers of attorney. We believed we were acting properly under the bankruptcy rules, under power of attorney with respect to these cure amounts. And in no way was this an attempt at interference. This was simply trying to submit cure notices in a timely fashion. There has been parties who have acted through you being -- not you, the contract counterparty, but you being the claims purchaser or attorney-in-fact or attorney-at-law but provided documentation, provided evidence as late as today that Your Honor has agreed and the debtors have agreed should be acceptable. And I don't -- I just -- again, I just don't see where the distinction is between allowing non-originals, between allowing "you" not meaning "you" but if you provide evidence but we didn't request the evidence but if you provided it by January

14th shouldn't it mean "you" being my clients who submitted documentary evidence on February 4th and February 5th, followed that up on several occasions requesting what other information --

THE COURT: Well, but I guess the difference is that by that point, the debtors have prepared for and had the confirmation hearing and I approved confirmation of the plan. That's the distinction.

MR. SAMBUR: Your Honor, I just -- again, because if there is an objection here, the debtors would now know the final cash payment until thirty days after the effective date anyway. So I don't see what impact that has on the confirmation hearing in addition to the arguments that Mr. Zinman made earlier, which was each one of these separate cure notices represents, at best, a negligible and immaterial amount. And again, we're talking about out of 314 -- I believe if I've tallied this correctly, 314 objections to these cure notices and 100 and -- let's say, 50 or 140 or so which, again, parties have stated there was ambiguity. That's why they filed responses. Or they attempted the best they could to comply, to follow the instructions. And that some submitted non-originals in their best efforts and that some simply provided evidence after the fact because they believed that they were complying. It's just a matter of degree. And I don't -- I just -- I don't see why my clients should not fit within that Pioneer standard

if other parties have in similar circumstances.

MR. BUTLER: Your Honor, this will be my final comment. I think it's our motion so we get to finish the argument unless Your Honor wants to hear more from us. And the only other thing I want to simply observe here is that Mr. Sambur suggests that there's being discriminatory justice passed out here. I don't think that is a fair inference on the record at all. What we -- as we sit here today, the order that we're asking Your Honor to enter would, aside from these 109, would draw a bright line for notices that were filed by -- no later than the 14th of January and that had attached to them authority for the signature that was appended to it. Those are all -- and I don't agree with Mr. Sambur because I got up and said that I'll accept the fact the McDermott Will was in fact the lawyers to the one --

THE COURT: The counterparty.

MR. BUTLER: -- counterparty changes that analysis at all. I just -- you know, the fact is that had not been asserted. And if it is, it is. We're going to recognize counsel that after their clients in these circumstances. So what's happened here, and Mr. Sambur has done a very good job over the course of the last month and a half, or two months, to try to dig his clients out of the hole they made for themselves by not following the order. And he sent lots of -- he's produced lots of documents. He's created lots of powers of

attorney. He's gotten lots of letters written. He has written lots of e-mails, all of them after the fact and none of them which changed the fundamental fact that his clients did not follow the solicitation procedures order. And we've heard his arguments as to why that is and Your Honor can determine, from the debtors' perspective, if Your Honor believes that they've made their case on the evidentiary record before you, we'll respect the ruling and move on.

THE COURT: Did you have a response to my point about optionality?

MR. SAMBUR: I'm sorry, Your Honor. If you could just clarify.

THE COURT: That if you kind of do it arguably right in the stock -- that you preserve the option depending on whether the stock goes up or down.

MR. SAMBUR: I believe what -- I believe what you're referring to, Your Honor, is if we -- if our contract counterparty received a stock rather than cash, we would sort of have an option to either --

THE COURT: No, no. I'm saying that by not filling out the form exactly as contemplated by the order you kind of have the option to say whether the form's right or not. And you can wait as long as you reasonably want to on that point to see which is the best alternative.

MR. SAMBUR: Certainly, Your Honor, in this case we

had e-mails and, again, calls reaching out to debtors' counsel which indicated as early as January 16th and phone calls thereafter indicating that we weren't trying to preserve an optionality here. And, in fact, what we're trying to do is just get this form accepted in the manner that it was submitted. And if that is the case and if the Court were to accept this in the manner submitted, we would have deemed to reject the cure notice. And the amount would be paid in cash as opposed to stock. And I don't think there's any question here, Your Honor. And as the debtors themselves have indicated, this really is a cash issue because of the perceived value of the stock.

THE COURT: Well, but let me -- but again, assume for the moment that between the date that Blue Angel submitted these forms as assignee and the date that we're at today, the stock market continued on in its very healthy cheerful way of last summer. Would you say if the debtors said well, you know, they made the election. They should take cash. Would you say oh, yeah, we did? Are you telling me that? Or isn't there some room to maneuver there and say we didn't really. We didn't know it. And how can -- you know, you got this order. How can you say that you can extend the order then say that we didn't elect cash?

MR. SAMBUR: I mean, I think what you're referring to is we'd actually be on opposite sides.

THE COURT: Yeah.

MR. SAMBUR: It'd be the debtors who'd be saying --

THE COURT: I understand.

MR. SAMBUR: And, you know, I think the only response to that is cash is always worth a hundred percent of its value. It's always going to be worth that cure amount. And the stock just --

MR. SACKS: Your Honor --

THE COURT: All right. I hear your answer.

MR. SACKS: Your Honor, I think there's nothing in the record to suggest that optionality, number one. Number two, the estoppel would be so clear in the circumstance, just so clear. I mean, it's the parties who submitted the original cure notices would be so clearly estopped from the optionality in addition to the fact that it really is just conjuring up, with all respect to the Court, conjuring some mal motive.

MR. ZINMAN: Your Honor, I might add that the price differential between the value of the stock and the cash was so great to make that possibility almost nonexistent at the time that we're talking about. Further, at the January 10th hearing, Mr. Shiff made clear that all of our clients wanted cash. So at least with respect to ASM and the others, it was clear what we were asking for. And even if the other estoppel -- and I agree with counsel --

THE COURT: No. ASM was clear from the start.

MR. ZINMAN: Yeah.

THE COURT: And the other two.

MR. ZINMAN: As long as -- if I can just raise a couple two --

THE COURT: Well, before we get to that, are there other -- someone has been standing up very patiently behind you all. Before Mr. Butler says he doesn't want to make any more points, we should hear from her, too.

MS. BERKOFF: Thank you, Your Honor. I was getting some exercise. It was fine. Leslie Berkoff, Moritt, Hock, Hamroff & Horowitz, Your Honor. We represent Robin Industries. To the extent that Robin Industries sold its pre-petition claim to Silver Point, those arguments are addressed. They're touched on in our papers; I'm not going to repeat them. They've been gone over at length. But some of the commentary and arguments that have just come forth sort of highlighted the second half of our objection and, if you would, our concern.

Robin Industries had a post-petition obligation that it believed it was due at the point in time that these notices went out. It did read that notice to reflect a pre-petition number that the debtor believed was due, disagreed with the number but Silver Point is addressing that and the post-petition number in time. And we filed an objection which, I believe, is going to be heard on March 19th to the assumption and cure obligations. And we've talked about what the impact

of the notice that went out is. And this is somewhat ancillary to the hearing. But my concern is that when we're talking about -- there's two concerns. The first is, when we're talking about the fact that the debtors sent out a notice identifying a pre-petition obligation and there was a post due, that we would have been responsible for responding to other than filing the objection, the pleading that we did. There's a concern. And perhaps that's best or more appropriately addressed on the 19th.

THE COURT: No, no. I think the notice is clear on that point.

MS. BERKOFF: Oh. To the extent that you believe that it's blocking the post-petition amount or the pre-petition amount? That it's just fixing the pre-petition amount?

THE COURT: Pre-petition.

MS. BERKOFF: Okay.

THE COURT: But I still have the question how did the parties -- I mean, now the debtor and the counterparty deal with this other than directly? You know, how did -- there's a third party injected into it. Isn't that really the counterparty's issue?

MS. BERKOFF: I'm not looking, Your Honor -- I guess -- and I apologize, I'm really trying to deal with the ancillary issue. I don't want to deal with the Silver Point issue. I feel that we've --

THE COURT: Well, I know. But I'm asking you to.

MS. BERKOFF: You're asking me to. Well, to the best that I can tell you factually and I apologize. I am local counsel not main counsel

THE COURT: Okay.

MS. BERKOFF: -- so I'm not as steeped as it. There were communications to the best of my knowledge and we provided Silver Point with the information that they would have needed to respond to that. That's how it was addressed.

THE COURT: No. But I'm saying as far as the purpose of this notice, which was in connection with an assumption under Section 365, all the rights derived from 365 which is a package of rights that the non-debtor counterparty to the contract has cure, both pre and post, or adequate assurance of prompt cure, adequate assurance of future performance and whether the parties want to negotiate the underlying business terms of their agreement going forward -- and I guess -- how is the debtor to deal with that package if it has to deal with potentially multiple assignees? I mean, we have this case with Credit Suisse assigned to Blue Angel and either Blue Angel may well assign to Marlita (ph.) Dietrich, you know? Who knows?

MS. BERKOFF: If you're talking about the practicality of it and you're looking for the input to the extent that we dealt with the process, Your Honor, when we negotiate the sale and assignments, we delineate between the

responsibilities and identify that -- it's a pre-petition number. The package of the business terms, the assumption, the going forward obligations -- and for that reason that's why Robin Industries is still here. It's concern of future obligations under the ongoing contracts that they not be affected by what's going on, that they be dealt with solely by the business terms. Those exist. And to the extent that the question is how can the debtor deal with two parties, if you would, the pre -- I think it's -- in my view, why is it any different than the fact that they have to deal with five million creditors. You have numbers; it's a number issue. On the assignee issue --

THE COURT: Well, except 365 talks about the trustee dealing with the contract. Anyway --

MS. BERKOFF: All right. I'm not -- I'm not --

THE COURT: I appreciate it. That's not why you stood up. I was just curious.

MS. BERKOFF: No. It's not -- but the point, if I can just get back to it, is just to clarify --

THE COURT: You're not -- you're not precluded by the fact that the objection that was -- the cure objection was just as to the pre-petition amount.

MS. BERKOFF: Right. And thank you very much, Your Honor. That was our concern. And we'll deal with the substance of that, I assume, on the 19th.

MR. BUTLER: Yes, we will.

THE COURT: Okay. Are there any other parties besides the three who have spoken here? Okay.

MR. BUTLER: Your Honor, I thought I said last thing but counsel -- the various counsels keep coming up with additional arguments and so I need to make one comment that Mr. Zinman just spoke to. And he made a statement that's not supported in the evidence and I just want to simply say he made a statement that made it sound like it was a factual view that the value of a cash distribution here is more valuable than plan currency. That would not be what the evidence was in the confirmation hearing. It is what -- you know, it sort of is what it is. I assume that because he represents a claims trader, they're looking at not an intrinsic value but looking at the current trading values. I have no idea what the basis of his statement is. But the fact of the matter is under the plan, a cash election does not get interest for two and a half years, post-petition interest. And a plan currency election gets -- the face amount of that claim gets a post-petition interest for a -- you know, roughly, two and a half year period. And if ultimately at the end of the day, the plan value that Your Honor found to be reasonable when you found the plan to be feasible in the confirmation hearing is ultimately realized in these cases. And the intrinsic value of this -- of the debtors prevails as the debtors believe that it will.

Ultimately, the ultimate value that -- of those who elected plan currency may well have ended up at the end of the day being a superior decision. So I just don't want this record and that statement to in any way be viewed as being agreed to by the debtors. The debtors rely on and will stand on the confirmation record that was made as it relates to valuation.

MR. SAMBUR: Your Honor, I just wanted to address your question to previous counsel regarding who is going to sort out objections with the debtors if these notices are, in fact, accepted. And both my clients, Blue Angel and Midtown Claims, indicated after filing these notices with KCC that they were going to have no further action with respect to the notices, that any objections going forward were going to be made by Methode, Palmer and Kimball, respectively.

THE COURT: Notwithstanding the powers of attorney.

MR. SAMBUR: We indicated actually --

THE COURT: So they had to give them back -- they gave them back again?

MR. SAMBUR: Actually, Your Honor, that's exactly what we did. In our letter we said, to extent necessary, we hereby waive our power of attorney so that you can enforce these claims --

THE COURT: Doesn't that, like, undercut the whole -- doesn't that show why this is prejudice, why this is a big deal?

MR. SAMBUR: Again, Your Honor, I think that if there was evidence necessary at that time for these parties to work out the proper amounts, that accuracy is what we're really looking at, then that documentation could have and would have been provided.

THE COURT: Okay.

MR. ZINMAN: Two very, very quick points, Your Honor. First of all, on behalf of each of our clients, I wanted to, on the record, join in the arguments made by various -- other objectors here. And secondly, I wanted to just point out a distinction between prior counsel's clients and ASM, that although we do have some that ASM signed, what we're primarily talking about here is not an issue of signatures but an issue of timing.

THE COURT: It's the timing issue, right.

MR. ZINMAN: Correct, Your Honor. And, in fact, two is for signatures -- there's uncontroverted testimony that two transferors refused to sign the transferor notices, the original notices because they felt that that authority was specifically granted to ASM under the agreements. And, in fact, the transfer agreements provide that all notices should be forwarded to ASM. And counsel for the debtors made an argument at one point that there was -- you know, that each of the parties, ASM included, intended to violate the order. There's no evidence that there was intent to violate the order.

The evidence says that maybe they didn't comply with the order, as Your Honor's ruled, but there's no -- that's different from saying there's an intent, as if we sat down, figured out what the order which Your Honor ruled and thought you know, this is what the order says but we're not going to do it anyways.

THE COURT: Okay. All right. Pursuant to a motion that was dated September 6th, 2007, the debtors in these Chapter 11 cases sought approval of several procedures in related forms of notice pertaining to their efforts to emerge from Chapter 11. The motion sought approval for timing and form of notice of the hearing on the disclosure statement, procedures for the temporary allowance of certain claims, setting a hearing date for plan confirmation and procedures for filing objections to a plan and solicitation of ballots on a plan and procedures for resolving disputes about post-petition interest claims and reclamation claims and, as relevant here, procedures for dealing with claims by parties to as yet unassumed executory contracts with regard to a requirement of Section 365(b)(1) of the Bankruptcy Code that before the debtor can be authorized to assume an executory contract or lease, the debtor must cure or provide adequate assurance of prompt cure of defaults under such contract. That motion was ultimately granted pursuant to an order dated December 10th, 2007 which is referred to as the solicitation procedures order.

As regards the motion itself, the relief sought in

respect of cure claim procedures was governed by paragraphs 83 through 87 under the upper case heading "Cure Claim Procedures". It explains the rationale for the request which is, first, to set up a method for determining cure claims with appropriate notice; and, second, to allow those who would have cure claims the choice of participating in treatment afforded to general unsecured creditors under the plan or, alternatively, to elect to receive cash. If the former option applied, then the contract party would receive post-petition interest in respect of its secured claim. And the cure claim plus the interest would be paid in plan currency as ultimately provided in the plan that would be stock in the reorganized debtors. If the counterparty elected to receive cash instead, it would not receive post-petition interest for the roughly two years that the debtors were in Chapter 11 in respect of its pre-petition cure claim.

The motion, in paragraphs 84 through 87, made it clear that the party the debtors were dealing with was the nondebtor contract counterparty to the supply contracts. That's made clear by the repeated references to the counterparty in paragraphs 84 and 85 and 86. In particular, paragraph 87 -- I'm sorry, paragraph 85 states "The cure amount notice provides that if the counterparty agrees with the debtors' stated cure amount, it may choose the treatment for its cure claim. If the counterparty disagrees with the cured

claim amount, the counterparty would be required to so mark and return the cure amount notice by November 9, 2007." As an aside, that date was later extended to January 11th, 2008. And then continuing on with the motion, "And such party must subsequently file a substantive objection to the cure claim amount. If the counterparty makes no election or does not indicate that it will dispute the cure claim, then such counterparty would be given the plan currency." The motion then says "The debtors propose to send the cure amount notice to the supply contract counterparties on or before October 29th, 2007." Again, that date was extended. Finally, it said "The plan provides, and the cure amount notice makes clear, that the cure claim amount will be paid directly to the contract party and not to the current holder of a claim underlying the cured claim amount, if any."

It's quite clear when reading the motion that the debtors' intent was to have the notice and the election all go to and be exercisable by the contract counterparty. That's really no surprise because that's generally how the assumption of executory contracts works. Under Section 365(a) and (b), the debtor deals with the party to the contract unless, of course, that party has assigned the entire contract to a third party in connection with the assumption and must establish that it has cured or provided adequate assurance of prompt cure that it's provided compensation or adequate assurance of prompt

compensation for any actual pecuniary loss resulting from the default and provides adequate assurance of future performance under the contract. In addition, it's Hornbrook law that the debtor can assume only the entire agreement absent the consent of a nondebtor party to the contract. It's also customary, however, in connection with assumption motions for parties to discuss whether as an addition to the debtors' agreement to assume the contract which generally prefers the nondebtor contract party because it provides for payment of pre-petition amounts owing in full as opposed to smaller bankruptcy dollars, that the parties open up the issue of whether any terms would be modified in return for that generally preferable treatment.

For the same reason or similar reasons, i.e., that the contract is viewed as an asset as well as a liability, pre-petition claims under nonassumed executory contracts generally are not treated as claims for purposes of Section 502 of the Code because the contract has not yet been assumed or rejected. If it is assumed, the cure amount gets treated under 365(b)(1)(a). If it's rejected, both Section 365 and 502 have a separate provision that specifies that the rejection claim is treated as a pre-petition claim. But that's only after rejection.

So generally, in Chapter 11 cases, there's no issue as to who the debtor properly should be dealing with as far as providing notice of assumption or rejection and working out

either by negotiation or litigation the requirements of Section 365(b).

Here, however, as noted, the debtor wanted to provide parties to executory contracts the option of electing plan treatment. I note that given the right to post-petition interest the option reflects the fact that assumption of the agreement here was not necessarily tantamount to preferring a contract party whose agreement was being assumed over the other unsecured creditors holding pre-petition claims because of those creditors' right to post-petition interest.

In addition, in the order that was negotiated with, among others, the members of the ad hoc trade creditors' committee and for which -- or in connection with which there was a settlement entered into that resulted in their agreement to the solicitation procedures order and, among other things, the debtors' agreement to pay a specified -- or agreed to the amount of a specified amount of attorneys' fees for the ad hoc committee, a procedure not only dealing with the election but also for providing additional courtesy notice to claims purchasers, the claims purchasers included the members of the ad hoc committee who were not trade creditors in the sense of having extended trade credit or provided goods and services but had instead purchased trade claims and accounts receivables.

The order approving the solicitation procedures covers cure claim procedures in paragraphs 44 -- I'm sorry, 43

through 45. Paragraph 43 approves the form of notice which is attached as Exhibit O to the contract counterparties, to the supply agreements that the debtors intend to assume. It also states "Parties wishing to object to the assumption of their contracts under the terms set forth in the cure amount notice shall be required to return the cure amount notice in accordance with the instructions provided therein so as to be received by the specified deadline." And then provides that "Such objecting parties shall also be required to subsequently file a substantive objection to the cure claim amount and/or assumption of their contract on or before the date that is thirty days following the effective date of the plan. The cure assumption dispute shall then be resolved following the effective date of the plan." It also provides, as the motion sought, that "The debtors are authorized but not directed to emit resolved uncontested or adjudicated distributions on account of cure directly to the contract party whose contract is being assumed or assumed and assigned."

Nothing in paragraph 43, therefore, suggests that anyone other than the contract counterparty should return the operative cure amount notice form attached as Exhibit O.

Paragraph 44 states "The debtors shall be authorized to provide a notice to holders, assignees, transferees and purchasers of claims of cure procedures established under solicitation procedures order, the form of which is attached as

Exhibit P, to parties that may have purchased claims from certain of the debtors' material supply agreement counterparties who have been provided with a cure payment election, pursuant to the cure amount notice", the cure amount notice being, again, Exhibit O to the order.

The order then goes on to say "This shall be the only notice the debtors shall be required to provide to these purchasers with respect to cure and these purchasers shall have no rights or recourse against the debtors with respect to the cure." It then goes on to say, in paragraph 45, that for those counterparties, i.e., the contract counterparties, who receive a cure amount notice for whom the debtors have multiple addresses, the debtors shall be authorized to transmit a form of notice, attached as Exhibit Q, which essentially acts as a warning listing the other addresses that the debtors have so that if, in fact, the recipient doesn't know about the context of the matter, he or she can look at the other addresses and are addresses that hopefully find someone who does.

In most Chapter 11 cases -- in fact, all of the Chapter 11 cases that I've presided over, the normal process would be simply to have Exhibit O or its equivalent sent out in connection with a motion to assume a contract. And the Exhibit P notice was truly, in my view, something that was an added -- I won't say courtesy 'cause I assume it was bargained for by the ad hoc committee, but an addition simply to alert those who

might have purchased accounts receivable that would constitute cures so that they could contact their assignor to coordinate a response by the assignor.

The Court heard nothing more about those portions of the solicitation procedures order until a motion was filed seeking an entry of an order to show cause by three -- actually, by more than three -- several members of the ad hoc trade committee on or around January 8th, 2008, well beyond the date when the cure notices were sent out by the debtors. That motion sought relief from paragraphs 43 and 44 of the solicitation procedures order. And the Court held a hearing on the motion on January 10th, 2008.

The record of the hearing and the Court's bench ruling is attached as an exhibit and is relevant to parties' knowledge and understanding of how the cure claim procedures were supposed to work. In essence, the movants sought relief to do a number of things. First, they sought more time to arrange for the submission of responses to the cure notices. Second, they sought authority to file them directly as opposed to having the counterparties file them. And third, they sought some ability to make a provision or a protective objection not knowing the exact amount of cure that would properly be owing under the pre-petition arrangements. They acknowledged they knew who their assignors were but they said it was difficult to reach them all. They also acknowledged that they didn't know

in most, if not all, cases on what basis to object to the cure notice, i.e., what the proper amount should be. It wasn't clear to me then whether in fact that was based upon their own failure to reconcile the amounts in conjunction with their assignors or for some other reason. But it did become quite clear during the hearing that there was a distinct and important rationale behind the procedure that the debtor had obtained approval for as part of the solicitation procedures order. And that was that, because of the requirements of Section 365(b), the debtor needed to deal with the contract party to these important supply agreements. And that absent unusual circumstances, it should be required to have to deal with more than the party to those contracts under Section 365(b).

I left room in my ruling for, under appropriate circumstances, to recognize some play in the joints in that important underlying policy. For example, I noted that if there was a request that was not timely honored for a new original ballot that the contract party could submit then there might be a rationale for a motion either under Pioneer and 9006 or, potentially, Rule 60. But it was clear then that the debtors were still receiving responses to the cure notices and that the actual facts would not become clear until after the deadline.

So I, therefore, denied the ad hoc -- the members of

the ad hoc committee's motion for modification of the solicitation procedures order given the importance of the debtors dealing directly with the contract counterparties and the structure of Section 365 as opposed to the claim that's created under 502 of the Code when a contract is rejected.

It so happened that, in fact, even at that late date the movants' counterparties or the movants' assignors, in large measure, did end up complying with the Court's order and submitting a proper response to the cure claim notice. But a number didn't. The debtors, therefore, filed a motion to strike non-conforming cure claim notices. I held a hearing on that motion last week on February 21. It was responded to by roughly 180 objections out of a far greater number of parties whose notices were covered by the motion to strike. And it appeared to me, after having reviewed the objections and based on the record of that hearing, that a number of the objections were well taken either in the sense that they were in substantial conformity with the solicitation procedures order or that they would pass muster under Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 507 U.S. 380 (1993) including, as interpreted by the Second Circuit, in, among other cases, Midland Cogeneration Venture Limited Partnership v. Enron, In re Enron, 419 F.3d 115 (2nd Cir. 2005).

That is, in each case where a counterparty timely

filed a response to the cure notice or the response to the cure notice was timely filed with a suitable direction by the counterparty that the entity signing it on behalf was indeed signing it on its behalf, I concluded that the motion to strike should not be granted. I also concluded that given that the hearing on confirmation of the debtors' plan did not begin until January 17th and that -- which was a Wednesday, and that the deadline for filing the response to the cure notices was Friday the 11th, that responses received by the following Monday would be suitably in compliance to meet Pioneer.

Where I believed, however, that the debtors' motion was well taken is in respect of circumstances that have been covered primarily today in today's hearing although I should say that it appears that at least in two respects as set forth on today's record, one, the notice filed by the law firm McDermott Will on behalf of a counterparty and also as clarified in respect of -- on the record, of three ASM claims provided that the debtors can confirm that they also met the criterion that I outlined on last Thursday. Those four claims in the aggregate or those four responses in the aggregate would be accepted from the relief sought in the motion to strike.

But as to all of the other objectors that it remained, the distinction is as follows in each of the other cases. What was filed within the time that I said would pass muster was a notice that was not signed by the contract

counterparty and did not have attached to it a direction by the contract counterparty, that the party submitting the response to the notice was authorized to do so on behalf of the contract counterparty. Specifically, the remaining so-called Silver Point assignee responses were filed by Silver Point, a claims purchaser, without any indication that the contract counterparties had so authorized Silver Point to do so and no -- in particular, no signature from such parties. The same is true of the Argo assignee notices, the Contrarian assignee notices and the Blue Angel and Midtown assignee notices.

The one exception to this is the notices -- the remaining notices filed by ASM. The record shows that fifteen of such notices were filed with appropriate signed instruction by the contract counterparty that ASM was authorized to act on its behalf. However, it appears that those notices were filed -- were received on January 17th, the day of the start of the confirmation hearing. In addition, certain other notices were received on January 22nd and 23rd.

The distinction over the authority to act, to my mind, is a significant one as I've laid out already now for the third time. What I've not pointed out in any prior ruling, however, is that the distinction was importantly underlain -- or underlied by the solicitation procedures order which made a distinction in paragraphs 43 and 44 between the counterparties who were authorized and directed to file the response to the

notice in Exhibit O in paragraph 43. And assignees and claim purchasers like Silver Point, ASM, Argo, Contrarian, Blue Angel and Midtown, who were very clearly to be given only the courtesy notice, attached as Exhibit P, and told, in my mind, in very clear terms, in paragraph 44, that they would have no rights or recourse against the debtors with respect to cure.

This certainly seemed to be the reading that the parties who made the motion that I decided on January 10th were taking. And I believe any reasonable person who had read the order would take that reading as well. And, as noted at oral argument, the solicitation procedures order went out to every creditor because it covered the fundamental issues of the debtors' procedure for emerging from Chapter 11, ultimately, in terms of the confirmation hearing.

Moreover, the solicitations procedures order is very clearly referenced repeatedly in the forms of notice attached thereto as Exhibit O and Exhibit P. So that if one had any question whatsoever about who should be sending in the notice, one could go online, onto the docket, and read the order.

Notwithstanding that, the various remaining claims purchasers have argued that their submission with no timely submission of any authority to do so by their assignees, the debtors' counterparties, of a cure claim form should be recognized either as a matter of law or pursuant to Rule 9006 and Pioneer because the neglect to comply with the solicitation

procedures order and the cure notices was attributable to excusable neglect.

I think we're at the point where the claim purchasers acknowledge that the notice sent to contract counterparties pursuant to the solicitation procedures order, that is, the notice attached as Exhibit O to that order, was directed to those counterparties and directed those counterparties to return the form. Certainly, that appears to me to be clear from the notice itself which says you must return this form in the envelope provided by the date provided and provides in the election yes, I agree with the cure amount or no, I disagree with the cure amount. And yes, I request payment of my cure amount in cash or I request payment of my cure amount on the distribution date in plan currency. I also believe it's conceded at this point, but even if it wasn't, I believe it's inescapable that the courtesy notice attached as Exhibit P to the solicitation procedures order, that is, the notice to holders, assignees, transferees and purchasers of claims which has no election provisions in it whatsoever and refers to the counterparties receiving the cure notice and states that this is the only notice that you, i.e., the assignees, transferees and purchasers of claims will receive would understand that it was the counterparties who were supposed to return the claim notice.

Nevertheless, it is alleged that because the

transferors of the pre-petition receivables by the contract counterparties to the claim purchasers included powers of attorney that the transferees and claims purchasers reasonably believed or at least should be excused from believing that they would have the authority to fill out the counterparty cure notice and send it in without any further indication to the debtor that they were authorized to do so.

I've read, I believe, all of the powers of attorney that have been attached as exhibits. And I note that, generally speaking, they deal with the claim that was assigned and that nowhere do they refer to any rights under Section 365. Nevertheless, most of them do provide for a power of attorney in respect of the assigned or transferred claim rights, which include in one shape or another claims, causes of action and/or other rights and benefits arising under or relating to the claim. So it is true that arguably the contract counterparty did provide the claim transferees with a power of attorney to deal with such issues notwithstanding the absence of any mention of Section 365.

One would very clearly come to the conclusion, however, that whether or not the debtors had access to such assignment agreements with their powers of attorney -- and the record is clear that in some instances the debtors did not because they were not filed with the notices under Rule 3001 -- the debtors obtained an order for important reasons and valid

reasons, as I said before, that directed the process to run through the contract counterparties. The rationale for that has been, I believe, well set forth in the record of this hearing and my prior rulings.

Under Rule 9006 and Pioneer, the Second Circuit has been clear as stated in Midland Cogeneration Venture, "We have taken a hard line in applying the Pioneer test. In a typical case, three of the Pioneer factors, the length of delay, the danger of prejudice, and the movant's good faith usually weigh in favor of the parties seeking the extension. We've noted, though, that we and other circuits have focused on the third factor, the reason for the delay, including whether it was within the reasonable control of the movant and we caution that the equities will rarely, if ever, favor a party who fails to file the clear dictates of a Court rule and that where the rule is entirely clear, we continue to expect that a party claiming excusable neglect will in the ordinary course lose under the Pioneer test." 419 F.3d at 122-123 quoting Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355 (2nd Cir. 2003). See also In re Musicland Holding Corporation, 356 B.R. 603 (Bankr. S.D.N.Y. 2006) where Chief Judge -- Chief Bankruptcy Judge Bernstein, in citing the Midland Cogeneration case, states that the Second Circuit focuses on the reason for the delay in determining excusable neglect under Pioneer and that the other factors are relevant only in close cases.

Before turning to the reason for the delay, I should note, however, that I do not minimize, by any means, the adverse affect of the relief that the claim purchasers would here seek to obtain on the debtors. It would, in essence, throw a monkey wrench into the procedures that the debtors had sought to have approved and that were approved and that all the parties in the case, except for these parties, operated under or have accepted, which is again that the debtor deals with its contract party under Section 365. Indeed, the rationale behind that policy is highlighted by Midtown and Blue Angel's agreement to have a power of attorney for the limited period it takes to assert a claim and then, again, to turn over the process to their assignor, the contract party, going forward.

The debtor reasonably relied upon what it believed it obtained in the solicitation procedures order, which is the right to deal with and hear from the contract party in connection with the cure notices. Now I've ruled that it's appropriate for it to accept the contract party's instructions if they came back with a cure notice. But where that did not occur, I believe that the debtor is indeed prejudiced. I also believe that there is or was room -- I'm not saying that this was actually done, but there was room for abusing noncompliance with the solicitation procedures order and notices to preserve optionality for the claims purchasers as to whether they would take cash or stock, although, as far as ASM, Argo and

Contrarian were concerned, their counsel went on record as stating without any qualifications that their clients would definitely take cash before the deadline during the hearing on their order to show cause request.

The delay factor is also significant to my mind. The hearing on confirmation of the debtors' plan started on January 17th and resulted in ultimately an unopposed -- or at least unappealed from confirmation order which is now final. In approaching a confirmation hearing, it's no secret that multiple parties in a debtors' case try to finalize their positions and their negotiations based upon the landscape as they reasonably perceive it at the time. Those negotiations continue on through the confirmation hearing itself. And it was reasonable for the parties to assume as they were resolving their outstanding differences over confirmation that the solicitation procedures order would be complied with. This is more than just a projection of the debtors' cash needs although that's significant. And although this is a large case, I believe that differences in excess of a million dollars in the aggregate between cash and stock are still meaningful. To my mind, a million dollars is always meaningful. But it goes beyond just projecting the debtors' cash needs.

Again, compliance with the solicitation procedures order, particularly after the hearing on January 10th, is something that I believe all of the parties who had not

resolved their disputes over confirmation until the confirmation hearing, and there were many, could reasonably rely upon, as should the debtors have been entitled to reasonably rely upon.

So, it seems to me two of the factors listed by Pioneer, even though under Midland Cogeneration and the other case law in the second circuit, those factors generally take a back seat to the reason for the delay, are clearly not -- are not clearly in favor of the claim purchasers here and, in fact, to my mind, tilt more in favor of the debtors.

As far as the reason for the delay is concerned, I would simply reiterate that it appears to me that the solicitation procedures order and the two notices are clear as to who was supposed to file the form. And the focus clearly was even more clear, which is that the contract counterparty needs to be the party dealing with the debtor. This was reiterated several times in the July -- I'm sorry, in the January 10th hearing.

It's argued, nevertheless, that certain contract counterparties must have been confused because they sent their original notice form directly to the claim purchasers to be submitted by the claim purchasers. I am asked to draw an inference because there is no direct testimony as to confusion that such an act indicates confusion.

It's also suggested by Blue Angel and Midtown that

they acted promptly to correct the situation, as did, it is argued, Silver Point, although it appears that Blue Angel acted a little faster, starting to deal with the debtors on February 4th and February 5th of 2008 after the confirmation hearing, showing powers of attorney and the like, and attempting to correct the impression that the forms submitted by Blue Angel and Midland (sic), which were signed by them as assignee and not attorney, either in fact or at law or under 9010(c), were in fact acting as attorney-in-fact.

Nevertheless, I conclude, given what I believe to be the clarity of the order and the notices, that the reason for the delay was within the reasonable control of ASM, Argo, Contrarian, Silver Point, Blue Angel and Midtown, and that when considered in light of the other three factors as well, there would not be a basis, with one exception which I'll address, for extending time to correct the improperly submitted forms. The one exception to this, I believe, is ASM in respect of the transfers received by the debtors on January 17th, date of the start of the confirmation hearing. I believe that, given the fact that ASM had attached to those documents the direction by the contract counterparties, that the date of the start of the confirmation hearing would not be unduly prejudicial to the debtors, again, in light of the fact that the counterparty itself was clearly, at that point, evidencing its direction to look to ASM as being properly authorized to do so.

So, with that exception, I believe that the remaining aspects of the motion to strike should be granted and that the objectors should not be given additional time on the basis of excusable neglect.

As far as the order is concerned, I think we've been over the relevant provisions and I think the record is clear on that point. The record is clear as to the intention of paragraph 9 as well as paragraph 11, and I also believe as far as paragraph 8 is concerned with regard to duplicate notices being true duplicates, and also the deletion of paragraph 7, since it's unnecessary given the grant of -- in paragraph, I believe it's 46, of the solicitation procedures order.

MR. BUTLER: Your Honor, what we would propose to do, if it's acceptable to the Court, is submit a further order with respect to the rulings today. I think that some parties have indicated they want to take a -- they may choose to take an appeal from that order. The order -- I don't think there's anything that people intend to appeal from the -- with these changes from the order dealing with last week's hearing because that provided that Exhibit -- that the contested matters are simply scheduled for hearing today. So we can --

THE COURT: All right. So you're going to submit two orders?

MR. BUTLER: Yeah, one order that dealt with last week's hearing, as we've circulated to the parties, and then

one order that deals with the --

THE COURT: The only thing I would sugge -- I would suggest perhaps that you do three --

MR. BUTLER: -- Okay.

THE COURT: -- because there were four claims -- five claims dealt with today, or five groups of claims. The four claims that I mentioned at the beginning, the one McDermott one and the -- well, you still have to do your due diligence and let's see.

MR. BUTLER: Right, we have to check those. If those are correct, Your Honor, we --

THE COURT: And then also the fifteen that were filed by the 17th.

MR. BUTLER: Right. Your Honor, with respect to those four you mentioned, the -- we'll do that. We'll submit that in that way, Your Honor.

THE COURT: Okay. All right.

MR. BUTLER: Thank you. Your Honor, I think that leaves us with one final matter, that is, the Temic motion that was filed outside of our motion to strike. It's the Temic Automotive motion for order extending time to elect, docket number 12827, and Mr. Berger is handling that on behalf of the debtors.

THE COURT: If other people wish to leave at this point, they are certainly free to.

(Pause)

MR. BERGER: Thank you, Your Honor.

MR. SULLIVAN: Your Honor, can I suggest that we take, like, a couple-minute break just so that I can use the restroom? Is that okay?

THE COURT: That's a good idea. In fact, I'd be happy to break for lunch. You can do your -- one of the Skadden people or the company people can do the due diligence on the ASM ones, and I can come back at 2:30, if that's acceptable too. Is that all right?

MR. SPEAKER: Thanks, Judge.

THE COURT: Okay.

(Recess from 1:41 until 2:41 PM)

THE COURT: Okay. All set. So we're back on the record in Delphi.

MR. BERGER: Good afternoon, Judge. Neil Berger, Togut, Segal & Segal. The last matter on Your Honor's agenda for the Delphi case today is the motion by Temic Automotive, motion for an order extending the time to elect at docket 12827. I represent the debtors regarding that motion, and McDermott Will & Emery is here to prosecute the motion.

THE COURT: Okay.

MR. SULLIVAN: Thank you, Your Honor. If it's all right, do you mind if I stay here?

THE COURT: That's fine.

MR. SULLIVAN: Okay. Your Honor, I guess before we even really get to the whole Pioneer issue and whether or not there was excusable neglect, the first issue was, was there actual notice to Temic? Paragraph 23 of Delphi --

THE COURT: Can I interrupt you just for a second? I take it, per the papers, but I just want to make sure of this, is there any dispute that Temic is an actual assignee of the contract, as opposed to a claim purchaser or, you know, a purchaser of just a portion of the --

MR. BERGER: Temic is a counterparty, not an assignee.

THE COURT: Okay. Well -- okay, it's a counterparty at this point in --

MR. BERGER: Yes.

THE COURT: -- the contract. Okay. Go ahead.

MR. SULLIVAN: Thank you, Your Honor. Paragraph 23 of Delphi's objection cites a number of cases for the proposition that there is a presumption that an addressee receives a properly mailed item when the sender presents proof that it is properly addressed, stamped and deposited in the mail. Delphi failed to meet its burden. First of all, despite numerous requests for copies of the notice allegedly served on Temic, Delphi hasn't produced them. Thus, there is absolutely no evidence in the record that they even exist.

Secondly, contrary to Paragraph of the Unrue

declaration and footnote 3 of the Gershbein declaration, the service addresses the debtors provided to KCC, the noticing agent, was an alleged Remit DUNS number. That alleged Remit DUNS number is not the quote, unquote "main address and point of contact for Temic" as is purported in the Gershbein and Unrue declaration. These Remit DUNS numbers were not provided to Delphi by Temic, and the debtors do not dispute that the main address and point of contact for its business with Temic is Temic's national headquarters in Deer Park, Illinois. The Deer Park, Illinois address was clearly identified in all relevant invoices at all relevant times. You can look at Exhibit 3 to Delphi's objection, which attaches the specific invoices at issue here. You can also look at Paragraph 10 of the Patton declaration submitted in connection with the motion, as well as Exhibit 3 to the Patton declaration, which attach copies of invoices throughout the period of time.

And Delphi offers absolutely no explanation or justification for its failure to attempt service at this address. The solicitation procedures require Delphi to serve Temic "at addresses in the debtors' books and records," and that's a quote. Quote, unquote, "at addresses in the debtors' books and records," and that such notice, quote, unquote, "shall satisfy the debtors' noticing obligations". And I refer you to Paragraph 45 of the solicitation procedures order. Given the only address clearly marked on Temic's invoices is

the Deer Park, Illinois address and that that address is undisputed to be its national headquarters, such address was in Delphi's books and records and Delphi had an affirmative obligation under the solicitation procedures order to serve Temic at the Deer Park, Illinois address.

THE COURT: The bills have the 75 Remittance Drive address, don't they? Please mail payment to 75 Remittance Drive?

MR. SULLIVAN: That's with respect to payment, but on the bottom of the invoice, Your Honor -- and certainly they never sent it to that address either, Your Honor. So it's not like we're quibbling about, you know, they sent it to one of the addresses listed on the invoice.

THE COURT: Well, the affidavit of service says they sent it to that one, right?

MR. SULLIVAN: No, it does not.

THE COURT: To 75 Remittance?

MR. SULLIVAN: It does not, Your Honor.

THE COURT: Okay. Let me just double-check. Okay.

MR. SULLIVAN: And contrary to Paragraphs 32 through 35 of Delphi's objection, the proof of claim reclamation notice and correspondence regarding the same are relevant because each of these items references the POs that are the subject of the plan cure notice. And, again, each reference is only the Deer Park address. Further, Delphi cannot claim that it was not

aware that Temic took over those POs from Motorola because it purported to notice Temic, not Motorola, with respect to those POs.

The notices sent to a large multinational company would need to be addressed to a specific person or at least to a department to be deemed properly addressed, even if the notices which were sent to these other tertiary addresses would be accepted. It's evidenced by the fact that similarly deficient notices were sent to other clients of McDermott, including Timken, Linear Technology and National Semiconductor. But I was forced to request duplicate originals for each of those companies because the notices had not been received, and I refer you to Exhibit 2 to Delphi's objection which evidences that fact. There's an e-mail exchange between myself and Delphi's counsel, which recorded --

THE COURT: Was there a reason why Temic wasn't covered by that?

MR. SULLIVAN: I was not representing Temic, Your Honor. I was not counsel of record for Temic.

THE COURT: Okay.

MR. SULLIVAN: Your Honor, contrary to Delphi's argument, Delphi was not served on Temic at four Temic addresses. The first address referenced is the Northbrook, Illinois address. That is a lab. It's undisputed that that is not the main address or the primary point of contact.

According to the certificate of service, only one of the two notices was purportedly served at that address, not both as set forth in the objection filed by Delphi.

The second address, the Nogales, Mexico address, is a manufacturing facility in Mexico. Again, not the main address or the primary point of contact. According to the certificate of service, only the other of the two notices was purportedly served here. And this particular notice is not even relevant to the dispute because it pertains to a -- you know, it has a cure amount of zero. So the only one that we're talking about was the one purportedly sent to the Northbrook, Illinois address.

The Farmington Hills, Michigan address -- there's no dispute that Temic hasn't been at that address in many months. That was never the main address or primary point of contact for Temic. And it is sheer luck that Temic eventually received a notice in connection with another matter; that's the steering sale cure notice that was sent in connection with the steering sale -- the sale of the steering business, and that that was received thirteen days after it was allegedly -- well, I guess it was served since we eventually got it. And the fact that the steering sale cure notice does not -- the fact that they got the steering sale cure notice does not mean that it received the plan cure notice. In fact, it may prove the opposite because Temic filed an objection to the steering sale

cure notice on the same day that it received it, on February 5th. And it is likely, therefore, that Temic would also have objected to the plan cure notice, had it received one. There is no indication in the certificate of service which of the two plan cure notices was allegedly sent to this address, the Farmington Hills, Michigan. If both were served at this address, the address would have been listed twice on the certificate of service, as was done for other contract counterparties where there was more than one PO.

Therefore, there is no way to tell from reviewing a certificate of service whether it was the certificate of service -- I'm sorry, the plan cure notice which is relevant here that was served at that -- purported to have been served at that address, or the one which is not relevant here.

With respect to the Elma, New York address, again, this is a manufacturing facility. It's undisputed that this is not the main address or the primary point of contact for Temic. Again, there is no indication in the certificate of service which of the two plan cure notices was allegedly sent to this address, the relevant or the irrelevant one.

Delphi's argument that this address was the correct one because the relevant invoices state that the goods were shipped from Elma is nonsensical. The invoices say quote, unquote "shipped from Elma" and nothing else. There is no Elma address on the invoices. Accordingly, there is no evidence in

the record that the relevant notice was served at any of these addresses other than the Northbrook, Illinois address.

Further, Your Honor, contrary to Delphi's arguments, Paragraph 2 of the Patton declaration clearly states that Temic did not receive the plan cure notices, not just that they hadn't seen them. Delphi has not produced any evidence as to whether or not any of the notices allegedly sent to Temic were returned as undelivered, and I think the silence on that point speaks volumes, Your Honor.

Further, it's clear that the debtors could have exercised means, given the importance of this issue, to ensure that the notices would be received. They could have used certified mail or fax or by e-mail to the primary contact, but they chose not to do so.

For all of the above reasons, the presumption of service of the plan cure notice is not warranted in this case.

Further, Your Honor, contrary to the arguments of Delphi, Temic had no duty to proactively ask Delphi if a plan cure notice had been served upon it. Temic had no idea whether Delphi intended to assume or reject the agreements and to be permitted to wait to receive a notice before being obligated to act on it. Accordingly, Temic did not willfully ignore a requirement, as Delphi suggests in Paragraph 41 of its objection. There is no evidence that Temic has acted in bad faith in this matter.

Imposing a duty to act on Temic would eviscerate Delphi's noticing obligation. In any case, as I just mentioned, I was not counsel of record for Temic at that time and could not be expected to have requested such a notice at the time. I made similar requests for other clients.

And it is unclear why Delphi even mentions in its objection the fact that I argued on behalf of Timken, not Temic, at the January 17, 2008 confirmation hearing, which post-dated the January 11, 2008 deadline by six days. Paragraph 6 of the Court-approved steering cure notice, Your Honor, dated January 23, 2008 says that the cure would be in the form of cash unless the sale does not close until after the plan effective date, in which case Temic would have the ability to make an election for a separate plan cure notice that quote, unquote "will be served on counterparties". It did not reference a previously served plan cure notice, implying that one would be served in the future. Delphi is obligated to honor Paragraph 6 of the steering cure notice by serving such a notice after the date of the steering cure notice.

Further, Your Honor, Paragraph 5 to Exhibit C to the order approving a disclosure statement suggests that if it did not receive a plan cure notice, Temic would have forty-five days after entry of an order confirming the plan to request a cure payment, again, leading Temic to believe that the fact that it did not receive any notice was not something should be

taken as being unusual.

Your Honor, further, Temic acted promptly upon learning of the alleged service of the notices. Counsel for Temic promptly reached out to Delphi's counsel, Togut, Segal & Segal, after eventually being served with a steering cure notice, and it promptly filed an objection immediately after receiving that notice. And it asked Togut, Segal & Segal how it could go about electing to receive cash. I mean, perhaps that particular point is moot at this point based upon some of the representations that Mr. Butler made here today that just the mere fact that an objection is filed to a cure notice means that that party will receive cash. So perhaps, you know, at a minimum, one could think that, at least no later than February 5th, 2008, Temic asserted its rights and objected to the cure notice. And, at that point, certainly it should have been deemed to have elected to receive the cash payment, notwithstanding the fact that Delphi has yet to produce evidence that any cure notice -- plan cure notice, actually, exists with respect to Temic.

Further, Your Honor, any delay was minimal, and given that this litigation is being addressed in conjunction with similar disputes involving other parties, the impact of any delay upon the debtors' Chapter 11 cases is minimal.

Your Honor, further, it's important to note that there is really no prejudice to Delphi in connection with this

matter. Delphi had already prepared to pay Temic a cure in cash if the sale of the steering business occurs before emergence. And there is no explanation by Delphi of how they would be prejudiced if Temic was also paid in cash if the closing occurs after emergence.

The exit financing and rights offering are not really relevant here, Your Honor, because the exit lenders and/or the investors must assume that payment of cures and cash is possible given that the cure will automatically be paid in cash if the closing of the steering business occurs before emergence.

Further, Your Honor, there is really no floodgate argument here either because it is not fair to grant Temic relief and not other parties, where other parties were put on notice of this issue as a result of Delphi's motion to strike and Temic's pleadings and response. Yet, no others have come forward seeking similar relief.

Temic should not be held to -- as I mentioned already, to an excusable neglect standard because it never actually got the notice, therefore there was really no neglect. Given the importance of the dollars at issue, Delphi could have taken a few extra steps to make sure that parties were notified and counsel of record received a copy of the notice. But even if Temic were held to an excusable neglect standard, Your Honor, for the reasons previously stated, we believe that Temic

has adequately met that threshold.

THE COURT: Well, let me just look at one thing. McDermott was counsel of record, though, weren't they, for Temic?

MR. SULLIVAN: McDermott Will & Emery was, but somebody from my Chicago office was representing Temic at the time, not James Sullivan or anyone from the New York office.

THE COURT: All right. Okay. Mr. Berger, let me just cut to one point quickly. Paragraph 45 of the solicitation procedures order --

MR. BERGER: Yes, Judge.

THE COURT: -- says that transmission of this proposed notice, i.e., the notice where there are multiple addresses, is applicable, together with the cure amount notice to addresses in the debtors' current books and records, shall satisfy the debtors' noticing obligations.

MR. BERGER: Yes, Judge.

THE COURT: And was it sent to the addresses in the debtors' current books and records?

MR. BERGER: In fact, it was. I have a witness with me today as to all the addresses that were sent to the plans (sic) and to counsel. We believe that we satisfied our obligations under the solicitation procedures order. As to a strong presumption of receipt, we rely upon the presumption of receipt to all of those addresses but for Northbrook, and if

Your Honor needs testimony, I'm prepared to put that on.

But yes, Your Honor, at last week's hearing the evidentiary record was closed. Introduced into evidence as Exhibits 1 and 2 are the declarations of Dean Unrue, who specifically said that the addresses used and transmitted to KCC for service of plan cure notices were addresses contained in the debtors' books and records. And Mr. Gershbein, who took the stand and was cross examined by McDermott Will, submitted an affidavit of service, which is before the Court today.

THE COURT: But there are bills attached to the Patton affidavit that include the Remittance Drive and Deer Park addresses on them.

MR. BERGER: There are three separate references to addresses to Temic in the invoices, Your Honor. I note that those invoices post-date entry of the solicitation procedures order, but those have three different addresses. There's a remit to. At the bottom there's a legend for, generally corporate headquarters, and there's also ship from Elma, and Elma is one of the addresses that the debtors sent a plan cure notice to. Rather than -- I'm prepared to spend time on the different plant locations but I think Your Honor touched upon a central point here, which is the KCC affidavit at Exhibit E. Pages 15, 22 and 27 specifically reference notices that were sent to the McDermott Will Emery firm, four separate notices. That was the exhibit under Exhibit P to the solicitation

procedures order. That notice isn't specific to any counterparty purchase order or location. What that notice says, Your Honor, is that you have an interest in some type of material supply agreement. The debtors are intending to assume of all their material supply agreements. An original plan cure notice has been sent somewhere other than where you're receiving this notice and you're on notice that you need to do something about it. So McDermott Will & Emery did act admittedly in response to that notice. They took credit this morning and one credit for being attorney of record for.

THE COURT: No, I appreciate that but the bill -- and I appreciate it's a February bill, but it says please mail payment to 75 Remittance Drive. You know, I just -- I mean, I guess that's the -- I mean, is that where the debtor sends payment and has -- I mean, that's the issue for me. Is that in the debtors' books and records, that address?

MR. BERGER: I can take a moment, Your Honor, but I would observe that Paragraph 45 of the solicitation procedures order doesn't require Delphi to serve counterparties at every location where a counterparty may maintain a presence. There are multibillion dollar corporations that are counterparties that have literally hundreds of locations throughout the world. Delphi isn't under an obligation to serve plan cure notices, courtesy copy notices, to all of those addresses. Delphi needs to look at its books and records, which it did, find addresses

for counterparties and serve notice at those addresses. And those addresses are presumed to have received -- are in receipt of notices. Counsel of record is presumed to have received notice of record.

So, Your Honor, Temic seems to be arguing that there is an obligation in this solicitation procedures order that we serve every address for a counterparty, and that simply doesn't exist in Your Honor's order. This is -- again, this is an issue of notice, not perfect service. Temic was put on notice, various forms of notice, that material supply agreements were being assumed and that there was a need to act in reply. Specifically, in response to a couple of points that counsel makes, I was contacted by McDermott Will & Emery not until about February 19th or February 20th, and my advice was you need to file some type of a motion. And the response was we've heard that before. It wasn't until Your Honor told McDermott Will & Emery to file a motion last week that it filed a motion on Friday. Temic, through its agent and counsel, acts as an agent for a counterparty in this case, knew of the debtors' intent to assume material supply agreements when the debtors filed their motion to approve the disclosure statement, and the disclosure statement order, known as the solicitation procedures order, was entered and when notice was sent out.

There is a point to us raising the issue of McDermott Will & Emery appearing at the January 17 confirmation hearing

because McDermott Will appeared before this Court specifically arguing a cure issue pursuant to Article 8 of the plan and, as to that client, was seeking retroactive interest payments. What counsel's appearance, counsel for Temic, has demonstrated that day is a familiarity with the procedures at play in this case.

Your Honor, I have a witness here I can -- I'm sorry, just a moment please. Your Honor, I do note that Delphi, in its ordinary course, doesn't require invoices, and it's unlikely that we -- it's highly unlikely that we issue checks. Most of Delphi's payments go by EFT, electronic funds transfer. So, to the extent that there is a remit to, and I know that -- I noticed that this invoice isn't authenticated, we think that for the other reasons and for the reasons I've just stated that the remit to address is not dispositive.

THE COURT: The address in the contract is what?

MR. BERGER: Farmington Hills, Michigan, same address that Temic received notice of the steering cure notice, received it, had it forwarded to in-house counsel and returned to Delphi with an objection.

MR. SULLIVAN: Your Honor, there's absolutely no evidence of that in the record. I'm not aware of any such contract with any such notice.

MR. BERGER: Your Honor, I can call the witness today and have a copy of the purchase order marked.

THE COURT: Okay. Well, why don't you do that?

MR. BERGER: All right. First, Your Honor, if I can call Mr. Evan Gershbein to the stand to address briefly one issue raised by counsel.

THE COURT: Before you do, is Mr. Patton here?

MR. SULLIVAN: Your Honor, he couldn't be here. He said, you know, if Your Honor would allow it, he would be available to testify telephonically. I'm not sure whether Your Honor would allow that, but unfortunately, because of the very short constrained timeframe of this, he wasn't able to be here today.

THE COURT: Okay. Do you want to cross examine Mr. Patton?

MR. BERGER: I think that the -- no, Your Honor. I think the affidavit is insufficient on its face.

THE COURT: Okay. Would you raise your right hand, please?

(Witness duly sworn.)

THE COURT: And, for the record, would you spell your name?

THE WITNESS: My name is Evan Gershbein, E-V-A-N G-E-R-S-H-B-E-I-N.

THE COURT: Okay.

DIRECT EXAMINATION

BY MR. BERGER:

Q. Good afternoon, Mr. Gershbein. I'm Neil Berger, attorneys for -- conflicts counsel for Delphi. Mr. Gershbein, do you recall submitting a declaration in connection with the debtors' motion to strike?

A. I do.

Q. Do you recall submitting an affidavit of service in connection with the debtors' application to provide notice of the plan cure notices to the counterparties?

A. I do.

MR. BERGER: Your Honor, may I approach the witness?

THE COURT: Yes.

MR. BERGER: Your Honor, I'm referring to Exhibit 40 of the evidentiary record, last week's hearing, which is Mr. Gershbein's affidavit of service. Your Honor, if I could take the copy from the witness. I have a different copy.

THE COURT: Okay. All right, you can go ahead.

MR. BERGER: Thank you, Judge.

Q. Mr. Gershbein, are you familiar with this affidavit of service?

A. Yes.

Q. Can you generally describe to the Court what this affidavit attests to?

A. This is actually a different copy, I'm sorry.

Q. Sorry.

A. Thank you. To answer your question, this is the affidavit

of service for the service on December 21st, 2007 for the cure amount notice and related cure notices.

Q. Very good. Would you please turn your attention to Exhibit A, page 178?

A. Okay.

Q. Does that page make any reference to Temic Automotive North America?

A. It makes reference to Temic Automotive of North EFT.

Q. And this is your affidavit of service?

A. It is.

Q. Can you describe what your reference to Temic Automotive of North America on this page describes?

A. There's two entries for two different notices. I can read the addresses. Temic Automotive of North EFT, 4000 Commercial Avenue, Northbrook, Illinois 60062, and Temic Automotive of North EFT-1, Patricio Lote 6 Park in San Carlo, Nogales Son., 84090 Mexico.

Q. Would you please turn your attention next to Exhibit C, page 77?

A. Okay.

Q. You there?

A. Yes.

Q. Is there any reference to Temic on that page, Mr. Gershbein?

A. Yes.

Q. Can you describe what your entries on this page describe?
A. This is the exhibit for the duplicate notices that were sent to Temic Automotive of North EFT and Temic Automotive of North EFT-1.
Q. And could you please read into the record the address for the first reference?
A. Temic Automotive of North EFT, Temic Automotive North America, 37101 Corporate Drive, Farmington Hills, Michigan 48331.
Q. And from this entry are you able to discern what was mailed to that address?
A. It was a complimentary cure notice.
Q. All right. And the next address, if you would read it into the record.
A. Temic Automotive of North EFT-1, Temic Automotive North America, 611 Jameson Road, Elma, New York 14059-9566.
Q. Would you please now turn your attention to Exhibit E of your affidavit?
A. Okay.
Q. I'm starting in reverse, error. Would you please turn -- reverse order. Would you please turn to page 27?
A. Okay.
Q. Can you describe to the Court what this Exhibit E pertains to?
A. This pertains to the claims holder cure notice, or the

transferee notice.
Q. And then the -- I'm sorry, at the end of Exhibit E, there is a copy of the notice. Sorry, it's Exhibit F. Is that the notice that went to the parties in Exhibit E?
A. That's correct.
Q. Okay. Back to page 27, do you see a reference to McDermott Will & Emery anywhere on that page?
A. I do.
Q. Could you tell the judge what you see there?
A. I see two entries for McDermott Will & Emery LLP.
Q. And, as with -- is McDermott Will & Emery the addressee of those two addresses for those two entries?
A. They are the -- they are the recipient.
Q. And is it drawn to the attention of anyone at McDermott Will & Emery?
A. James M. Sullivan, Esquire.
Q. All right. Back to Exhibit A, Mr. Gershbein, as to the first entries, Exhibit A, page 178, does KCC track returned mail of the plan cure notices?
A. We do.
Q. And you're familiar with those books and records?
A. Yes.
Q. Okay. As to the address for Temic North America in Nogales, Mexico, is there any record of returned mail for that plan cure notice?

A. There is not.
Q. Okay. Turning to Exhibit C, page 77, you reference a courtesy notice to Temic at Farmington Hills, Michigan. Is that correct?
A. I do.
Q. Is there any record in KCC's books and records to indicate that the complimentary cure notice that was sent to that address was returned?
A. There is none.
Q. And as to Temic Automotive at 611 Jameson Road in Elma, New York, same question: is there any record at KCC in KCC's books and records that the complimentary cure notice that was sent to that address was returned?
A. There is none.
Q. All right. Now I'm turning back to Exhibit E to the notices that were sent to McDermott Will & Emery. Is there anything in the KCC books and records to indicate that any of the plan cure notices that were sent to McDermott Will & Emery were returned?
A. There is none.
MR. BERGER: All right. I have nothing else for this witness.
THE COURT: Okay. Any questions?
MR. SULLIVAN: Yes, Your Honor, just a few.
CROSS EXAMINATION

BY MR. SULLIVAN:

Q. What are you looking at in order to determine whether or not any of the notices were returned?

A. I just looked at it last night, so --

Q. What did you look at last night?

A. I looked at our most current version of our returned mail tracking list.

Q. Did you bring that with you today?

A. I -- I looked at an electronic copy. I didn't --

Q. So you're going off of memory?

A. Yes.

Q. Okay. So, there's no -- but you have a document; you just didn't bring it with you?

A. We have documents, yes.

Q. But you didn't bring it with you?

A. No. I mean, it's just an Excel file, so --

Q. With respect to Exhibit C that you were just discussing, the complimentary cure notice, you were referring to a page, I think, 77.

A. All right.

Q. How do you know which notice was sent to each of those addresses?

A. You can't tell by this service list but I do know because I also looked at that last night.

Q. What did you look at last night?

A. Well, we did the mailing. The addresses on this list relate to the purchase orders on the underlying cure amount notice, and so I'm able to refer by the purchase order number and our merged files that were used to create this notice as to what exact notice went to these addresses.
Q. Again, you didn't bring that with you today, did you?
A. No.
Q. Okay. And you're not testifying that both notices went to each of these addresses on Exhibit C, are you?
A. I'm not.
Q. In fact, that's not what happened, correct?
A. That's right. That's not what happened.
Q. Okay. So, the statements in the debtors' objection that each of the notices are served at both of those addresses, that's just wrong, right?
A. I don't recall hearing that.
MR. BERGER: Your Honor, I object to the question. That's my statement on behalf of the debtors, not Mr. Gershbein's statement.
THE COURT: But your testimony is that the actual cure notice went to the ones on Exhibit A?
THE WITNESS: Exactly, yes.
THE COURT: And the complimentary notice went to the one on Exhibit E?
THE WITNESS: C.

THE COURT: C?
THE WITNESS: Right.
THE COURT: As well as E?
THE WITNESS: E is the generic transferee notice.
THE COURT: The generic one?
THE WITNESS: Right.
THE COURT: Okay.
MR. SULLIVAN: Okay, the ge -- I'm sorry, I didn't mean to interject.
THE COURT: So the one on C is the multiple address notice?
THE WITNESS: That's right.
THE COURT: All right.
THE WITNESS: It's the notice --
THE COURT: What's referred to as a notice form Q on the order?
THE WITNESS: It's the one with the watermarks version as an exhibit of the cure amount notice itself.
THE COURT: Right. Okay.
BY MR. SULLIVAN:
Q. Okay. All right. Just to be clear, because I just want to make sure -- because I think it's important, there were two notices referenced in Exhibit A, correct?
A. Yes.
Q. All right. And you're not testifying today that each one

of those notices in Exhibit A was served at each of the addresses in Exhibit C, correct?
A. That is correct.
Q. That didn't happen here, right?
A. That's right. It did not.
Q. Okay. And you didn't bring anything with you in court today to tell you -- to figure out which notice went to which of those complimentary addresses, right, which of the notices in Exhibit A? So if I point to the first notice in Exhibit A, referenced, you don't know whether it went to the first address or the second address, do you, in reference to Exhibit C?
A. Not by this list, no.
Q. So we don't know whether -- if I'm referring to, on Exhibit A, the one that went to -- allegedly went to the lab in Northbrook, Illinois, you don't know whether that was allegedly also sent to the address in Elma or the address in Farmington Hills, right?
A. I do know from reviewing my files last night.
Q. And what -- so what -- but you have nothing here with you today, right?
A. That's correct.
Q. Okay. And based upon your memory from what you looked at last night, the notice that went to Farmington Hills -- I'm sorry, not Farmington, Northbrook, Illinois, that did not go to the Elma address, did it?

A. It did not.
Q. Okay. So, at best, maybe it went to this Farmington Hills address?
A. That's -- based on my memory, that's the address it went to.
Q. Okay. So the Elma address is the one that's identified as a ship to on the invoice but the notice wasn't actually sent to that address, correct?
A. I -- I don't know what was identified as a ship to.
THE COURT: Well, what did Elma get then?
THE WITNESS: They would have gotten, then, the address that -- the notice that went to Mexico, to the Mexican address.
THE COURT: To the multiple address that listed just Mexico on the watermark?
THE WITNESS: No.
MR. SULLIVAN: I think I can probably clear this up for you, Your Honor.
Q. There are two -- one of the invoices -- one of the POs referenced in Exhibit A, the one that went to Mexico, next to it has a dollar denomination of zero, correct?
A. I would have to take a look at the notice.
Q. You can look at the notice. It's Exhibit A, page 178.
A. The one that went to the Mexico address has a zero dollar purchase order.

Q. Right. And just so Your Honor is clear, that's not an issue here today. The only one that's allegedly -- the only one that's at issue here today is the one with an actual dollar figure of the two point some odd million dollars that allegedly went to the Northbrook, Illinois address, okay. So that -- the only other address that that notice was sent to was the complimentary address in Farmington Hills, Michigan, right?

A. That's -- the -- that notice, as an exhibit to the complimentary notice, went to the address in Farmington Hills.

Q. All right.

MR. SULLIVAN: And just so Your Honor -- just to remind Your Honor, that's the address where it's undisputed that Temic no longer has a facility there, okay. So --

MR. BERGER: Your Honor, objection. That's counsel testifying.

Q. I'll direct you to Exhibit E. I think you were looking at page 27?

A. Okay.

Q. Okay. You testified a short while ago about two notices that were sent attention of James Sullivan, correct?

A. That's correct.

Q. And the party name is Silver Point?

A. The party name is SPCP Group LLC as agent for Silver Point Capital Fund, L.P. and Silver Point Capital Offshore Fund, Ltd.

Q. Right. And McDermott Will & Emery and James Sullivan

don't represent Silver Point, do they?
A. I would not know.
Q. And you're not alleging that a copy of the Temic notice was attached to a notice that was sent to McDermott Will & Emery to the direction of Silver Point? You're not alleging that that was -- that a copy of the Temic cure notice was attached to that, were you?
A. Exhibit E is the generic transferee notice that's listed in Exhibit F.
Q. So it doesn't reference Temic at all, does it?
A. It would not.
THE COURT: Would it reference Silver Point or would it --
THE WITNESS: It -- it would be exactly as it's written on this service list.
THE COURT: So it would represent the Silver Point entity, reference it?
THE WITNESS: That's true.
Q. Okay. So it wouldn't put McDermott Will & Emery on notice that anything went to Temic, would it?
A. I wouldn't know what it would put them on notice for. I know what was sent to them and what address it was sent to and how the address label looked. I'm not sure what notice that provides them.
Q. So you don't know?

A. No.

MR. SULLIVAN: I'm not sure this if is the right witness for it, Your Honor. Perhaps there's another witness at Delphi, which I could show it to. I -- you know --

THE COURT: Well, why don't you try?

MR. SULLIVAN: Okay.

MR. SULLIVAN: I don't know how you want to reference it.

THE COURT: Well, are you looking to introduce it or just to -- as a demonstrative or refresh his recollection?

MR. SULLIVAN: Well, I guess we could play it that way and go through it.

THE COURT: Why don't you ask the witness if he's familiar with it?

MR. SULLIVAN: Okay.

Q. Can you -- are you -- can you take a look at what I just handed to you? It purports to be a number of invoices between --

MR. BERGER: I'm sorry, Your Honor. Before you address this witness, I'd like to know what you're referring to.

MR. SULLIVAN: It's the -- it's just the invoice that I just handed to Your Honor.

THE COURT: It's the bills that are attached to the motion.

MR. SULLIVAN: Your Honor, these actually aren't attached to the motion. There were some that were attached to the motion but counsel for Delphi raised an objection about the --

THE COURT: Oh, I see.

MR. SULLIVAN: -- timing of the invoices.

THE COURT: I see. So it's similar invoices. They're not --

MR. SULLIVAN: Similar invoices referencing the same PO but a slightly earlier time period, just in order to deal with the objection that Delphi raised with respect to the timing of it. It's worth noting that Paragraph 10 of the declaration submitted by Mr. Patton specifically states that the billing invoices at all relevant times periods had the same Deer Park address. There's also the invoices where --

THE COURT: Okay, you --

MR. SULLIVAN: Okay. I apologize, Your Honor. I didn't mean to belabor the point.

MR. BERGER: I think the first question is whether or not the witness has ever --

THE COURT: Exactly --

MR. BERGER: -- seen it and is familiar with it.

THE COURT: -- is the witness familiar with these documents?

BY MR. SULLIVAN:

Q. Are you familiar with -- have you ever reviewed any of the invoices, Delphi invoices, in connection with preparing your notice list?
A. No.
Q. Did you review any books and records of Delphi in connection with putting together the service list?
A. I'm not sure what you mean by books and records. I received the addresses that are listed on the service list from Delphi.
Q. So Delphi just provided you with addresses but didn't ask you to review books and records in order to determine which addresses to send the notices to?
MR. BERGER: Your Honor, I think this line of questioning is outside the direct testimony. Mr. Gershbein was specifically asked about the particular addresses.
THE COURT: Well, I think it's fair to ask him where he got them from.
MR. BERGER: Very good.
A. Can you repeat the question?
Q. So you were just provided with addresses? You weren't provided with copies of Delphi business records to review in order to determine where to send the notices to, correct?
A. That's correct.
THE COURT: Any -- is that it?
MR. SULLIVAN: Yeah, nothing else right now,

Your Honor.

THE COURT: Any redirect?

MR. BERGER: Yes, just briefly.

REDIRECT EXAMINATION

BY MR. BERGER:

Q. Mr. Gershbein, back to Exhibit E, if you would turn to page 27.

A. Yes.

Q. The column address number 1, does that denote where the notice was sent?

A. That's the first line of the address label.

Q. Very good. And as to the two to McDermott Will, can you tell the Court the first line in that address?

A. The first line in the address? The first line in the name field?

Q. Yes.

A. SPCP Group, LLC, as agent.

Q. I'm sorry. I was --

A. The first notice name would be McDermott Will & Emery LLP.

Q. That's my question, thank you. And the form of notice that was sent to the parties in Exhibit E, that's the one attached to Exhibit F --

A. That's correct.

Q. -- that we're referring to. And that's a generic notice?

A. That's correct.

Q. Did any of those notices specifically reference a particular purchase order?
A. They did not.
Q. Did they particularly reference a particular contract counterparty?
A. They did not.
Q. And --
THE COURT: But I thought you said they referenced Silver Point, though.
THE WITNESS: The address label on the envelope.
THE COURT: Okay, even though it went to McDermott Will?
THE WITNESS: Right.
THE COURT: Okay.
THE WITNESS: The contents of the envelope are all the same for all of them.
THE COURT: Okay.
MR. BERGER: Your Honor, I have nothing else for this witness.
THE COURT: Just let me make sure I understand. The two plus million dollar cure notice, not the one that was attached to the Mexico mailing but the other one, that went only to the Farmington Hills address?
THE WITNESS: That's right. That's the -- that Farmington -- Farmington Hills address is associated with the

purchase order number for that.

THE COURT: Did anyone -- did any of the other mailings, the other three that are referred to in the exhibits to your affidavit of mailing, did any of those other mailings refer to that purchase order or to that contract?

THE WITNESS: Two of the mailings referred to that purchase order and the other two mailing referred to the other purchase order.

THE COURT: And which were the two that referred to that purchase order?

THE WITNESS: So the -- in Exhibit A, the one to the Illinois address, referred to that purchase order, and then the complimentary -- the related complimentary cure notice -- to the Farmington Hills it referred to.

THE COURT: Okay. Okay. Okay, anymore questions? Okay --

MR. SULLIVAN: No, Your Honor.

THE COURT: -- you can step down, sir.

MR. BERGER: Your Honor, I have a few short questions for the next witness, Dean Unrue.

THE COURT: Okay.

MR. BERGER: Mr. Unrue?

(Witness duly sworn.)

THE COURT: Could you spell your name for the record?

THE WITNESS: It's Dean, and Unrue, U-N-R-U-E.

MR. BERGER: Your Honor, may I approach the witness?

THE COURT: Yes.

(Purchase order with Temic Automotive of North America was hereby marked as Debtor's Exhibit 1 for identification, as of this date.)

MR. BERGER: Your Honor, I'm marking an Exhibit.

THE COURT: Okay. What are you marking it, Exhibit number 1?

MR. BERGER: Yup. Thank you, Judge.

MR. SULLIVAN: Can you just give me one minute to just take a quick look at it?

MR. BERGER: Yes.

(Pause)

MR. BERGER: Counsel, I won't go beyond the first page.

(Pause)

MR. SULLIVAN: Okay. Thank you.

DIRECT EXAMINATION

BY MR. BERGER:

Q. Mr. Unrue, you just heard Mr. Gershbein testify as to certain addresses in his affidavit of service for Temic?

A. Yes.

Q. Are those addresses comprised of information contained in the debtors' books and records?

A. That's correct.

Q. I've shown you a document that's been marked as Exhibit 1. Do you have that document in front of you?
A. Yes.
Q. Do you recognize this document?
A. Yes.
Q. Can you tell the Court what this document is?
A. This is a purchase order with Temic Automotive of North America.
Q. Is there an address for Temic Automotive on the first page of it?
A. Yes, there is.
Q. Would you read into the record the address?
A. Temic Automotive of North America, Inc., 37101 Corporate Drive, Farmington Hills, Michigan 48331.
Q. And just to the right of that and in a slightly shaded box, could you please read into the record the text that appears below the legend invoice to?
A. Yes. It says, "Invoiceless purchase order. Do not mail invoice."
Q. All right. On the bottom of this page, the last full paragraph that begins with the word "this", would you please read that language into the record?
A. Yes. "This purchase order is an invoiceless purchase order. Do not send an invoice. Payment will be based on receipt records. Any questions concerning payment should be

directed to the supplier relations at phone number (248) 874-4636."

Q. Very good. Earlier, counsel for Temic referred to certain invoices unauthenticated but still before the Court with language that has please remit payment to, and has 75 Remittance Drive street. Based upon the language you just read into the record, would there have been any reason why Delphi would have mailed checks or otherwise sent mail to the remit to address?

A. The remit to address on the invoice?

Q. Yes.

A. No.

Q. And the address here and the other addresses that you've testified were in the debtors' books and records and in your declaration, did you state that that was among the forms of information that provided KCC for service of the plan cure notices?

A. That's correct.

Q. Very good.

MR. BERGER: I have nothing else for this witness, Judge.

THE COURT: Okay. Cross?

MR. SULLIVAN: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. SULLIVAN:

Q. These purchase orders, how are they sent to Temic?
A. I don't know.
Q. You don't know? Has Delphi been receiving goods from Temic that it's ordered?
A. I -- I -- I don't know the answer to that. I would assume so.
Q. Okay. So you don't know whether or not this was actually mailed to the Farmington Hills address, right?
A. The purchase order itself?
Q. Right.
A. No, I don't.
Q. Okay. Are you aware that Temic no longer has a facility at the Farmington Hills address?
A. No, I'm not aware of that.
Q. If somebody at Delphi had questions or a dispute regarding an invoice, who would they call?
A. I'm sorry, I didn't hear the question. Could you repeat it?
Q. Sure. If somebody at Delphi had questions or a dispute regarding an invoice or a purchase order, such as this one, who would they call?
A. If they had questions regarding the purchase order, I would assume they would call the number directed at the bottom of this purchase order. If they had questions regarding the invoice, I assume they would contact our accounts payable.

Q. Which phone number are you talking about?
A. The one that's listed on the bottom of the purchase order.
Q. Which one?
A. It says "be directed to supplier relations at (248) 874-4636".
Q. Isn't that a Delphi phone number?
A. I -- I don't know.
Q. You don't know?
A. I would assume so.
Q. What personal knowledge do you have about this purchase order at all?
A. We received a file of all our assumable contracts from our global supply management group, and I received a file of the purchase orders that are assumable.
Q. Do you have any familiarity with the business relationship between Delphi and Temic?
A. No.
Q. Is there anybody in this courtroom who does?
A. Not that I'm aware of.
Q. When was this purchase order sent?
MR. BERGER: Your Honor, I'm sorry.
A. I think --
MR. BERGER: I'm sorry. I object to the question. He's asked whether or not he knew whether or not it was sent. He said he did not know.

THE COURT: Okay. I guess it's been asked and answered.

Q. So you can't tell, then, from reviewing the purchase order?

A. I'm not in global supply management. My function was to implement the solicitation procedures order and receive contracts from GSM and develop the cure amounts associated with those contracts, use the addresses in our books and records and forward the file to KCC.

Q. You don't know where the Farmington Hills address came from, whether that was supplied by Temic or whether it was somebody at Delphi?

A. The Farmer -- Farmington Hills address is an address that's in our books and records.

Q. Do you know where the address came from, though?

A. The address that I used to send the file to KCC came from our books and records.

Q. I'm talking about do you know where the address on this purchase order came from?

A. The typewritten address? No, I don't.

Q. There's also a -- before you, there's a series of invoices there to your right. Have you ever seen those before or anything like it?

A. No, I have not.

Q. So, assuming that those invoices had been received by

Delphi, wouldn't that be part of Delphi's business records?

MR. BERGER: Excuse me, Your Honor, asking the witness to speculate.

THE COURT: True. I think -- you and I and Mr. Berger can talk about that, but he wouldn't have anything to add to that.

MR. SULLIVAN: Okay.

Q. I mean, I could certainly refer you to Exhibit 3, which is attached to the debtor's objection, which are the actual invoices at issue.

THE COURT: No, but it's the same point.

MR. SULLIVAN: Okay.

THE COURT: When you -- Mr. Unrue, when you requested of the operations people to provide the contact information or address information for the contract counterparties, did you ask for any invoices?

THE WITNESS: We didn't ask for invoices, no.

THE COURT: And why was that?

THE WITNESS: Because we wanted to use the address of record in our purchasing system and we wanted to be consistent and use the Remit DUNS, which is the address of record in our purchasing system, and any other addresses that were in our books and records.

THE COURT: Okay.

Q. And the Remit DUNS address, that wasn't provided to Delphi

by the supplier, was it?
A. The Remit DUNS address is the address that's in our books and records.
Q. Right, but you did not obtain that from the supplier, correct?
A. I obtained it from our internal systems.
Q. And you don't know who inputted that address into your systems, correct?
A. I know that it's the address of record on the purchase orders that are in our books and records.
THE COURT: In other words, it comes off the purchase orders?
THE WITNESS: That's correct.
Q. All right. And you don't know where those addresses came from or why Delphi chose to use those addresses on the purchase orders?
MR. BERGER: Your Honor, asked and answered.
THE COURT: Well, you can -- go ahead and answer that.
A. Well, I was just going to say that I know that the addresses we used that were supplied to KCC came from our purchasing system. They were the addresses associated with the contracts that are in question.
Q. Right. But what I'm saying is you don't know how they got into your purchasing system in the first place?

A. I would assume by our purchasing people.
Q. But you don't know?
A. No.
THE COURT: Any more questions?
MR. SULLIVAN: Not right now, Your Honor.
THE COURT: Any redirect?
MR. BERGER: Your Honor, just a short redirect.
REDIRECT EXAMINATION
BY MR. BERGER:
Q. Mr. Unrue, counsel for Temic harps on whether or not you were provided invoices. Does Delphi ordinarily use an invoice billing system for payment of goods received?
A. No.
Q. And what system do they use -- does Delphi use?
A. The -- the payment is triggered upon the delivery of the goods.
Q. All right. So invoices are irrelevant for purposes of payment once goods are received?
A. That's correct. That's right.
MR. BERGER: Nothing further for this witness, Judge.
THE COURT: Okay. You can step down, sir.
MR. BERGER: Your Honor, may I address the Court?
THE COURT: Sure.
MR. BERGER: Your Honor --
THE COURT: You don't have any other witnesses,

right?

MR. BERGER: No, Your Honor.

THE COURT: Okay.

MR. BERGER: No, no other witnesses.

THE COURT: Okay.

MR. BERGER: Your Honor, Temic improperly frames its argument as whether or not service was made in a fashion that it would prefer or in some perfected way. The debtors satisfied their notice obligations, as required by the solicitation procedures order. Temic seems to argue that the solicitation procedures order somehow requires the debtors to have served plan cure notices to corporate headquarters in each and every location of each and every one of its materials contract counterparties. No such obligation exists in the solicitation procedures orders. The aim of the solicitation procedures orders was to put counterparties on notice that the debtors were seeking to assume material supply agreements and that there was a legal court order obligation to respond. The debtors did their best under the solicitation procedures order and sent four plan cure notices to Temic, two pertaining to this plan cure notice. As to the Farmington Hills address, we rely upon a presumption of receipt. Not as to Northbrook but as to all of the addresses that we sent plan cure notices, including the one attached as Exhibit F to the Gershbein affidavit, we do rely upon the presumption of receipt.

There is no affidavit by any employee from Farmington, the Mexico operation or the Elma operation to deny receipt. The only affidavit --

THE COURT: But the Farmington and Elma got notice of a different contract, right?

MR. BERGER: No. Farmington, the testimony --

THE COURT: Oh, I'm sorry, Elma and Mexico.

MR. BERGER: Elma got something else, and I'll address that point.

THE COURT: Elma and Mexico, that's what I mean.

MR. BERGER: I'll address that.

THE COURT: Right.

MR. BERGER: Farmington was sent a watermarked copy of the plan cure notice for this plan cure notice.

THE COURT: But their point there is that Farmington was closed.

MR. BERGER: I understand their point, Your Honor, but what they haven't controverted and what they readily admit is that the steering plan cure not -- the steering cure notice went to that address, was received, sent to in-house counsel and returned to the debtors with an objection within about six or seven days. That's set forth in their objections to the motion to strike and incorporated into their motion for -- the motion that's before this Court now.

As to those addresses, Your Honor, Temic is presumed

to have received notice of the debtors' intent to assume Temic contracts at, at least, three of the four locations. Temic's counsel has been actively involved in the disclosure statement and plan confirmation process. McDermott Will was served with at least two, and it appears four, generic courtesy notices that put McDermott Will on notice that material supply agreements were going to be assumed by the debtors.

THE COURT: But ones that -- where Silver Point was involved, right?

MR. BERGER: Well, the address on the outside label may have said Silver Point, but McDermott Will was counsel of record for a number of material supply counterparties. And, as we've set forth in our response and as counsel admitted into the evidentiary record, counsel affirmatively reached out to the debtors and sought duplicate copies of plan cure notices. Counsel said that he spoke to each of his clients and that he wanted duplicate cure notices. In response, the debtors, that same day, said send us a list of all your clients for whom you want cure notices. Counsel sent back an e-mail to the Skadden firm listing clients but not Temic. The debtors had no reason based upon that e-mail exchange that anything other than receipt occurred for Temic for this purchase order.

Counsel received the notice sent to it pursuant to Paragraph 44; he was put on notice. And it's our position, Your Honor, that Temic did have, through its agent in this

court, actual knowledge of the deadlines and procedures for the cure notice.

THE COURT: The ones for Timken and the like where you asked for more information, those were Silver Point related, were they?

MR. SULLIVAN: No, Your Honor.

THE COURT: Okay.

MR. SULLIVAN: Well, I mean, Timken did sell its -- no -- yeah, Timken did sell its claim to Silver Point.

THE COURT: But at that time, or was it -- I mean, were you -- did the --

MR. SULLIVAN: I never represented Silver Point, if that's what you're asking me.

THE COURT: I guess that's what I'm asking. Did the appearance of the Silver Point sub on the envelope, was that what triggered your inquiry, or was it just --

MR. SULLIVAN: No.

THE COURT: -- you thought I generally ought to ask about this because --

MR. SULLIVAN: Ask about it because my clients were interested in knowing about it and I was --

THE COURT: Okay.

MR. SULLIVAN: -- you know.

THE COURT: Okay. Okay.

MR. BERGER: The last comment is, as acknowledged by

counsel, he was counsel of record for this particular material supply counterparty when that notice was served, and he made those inquiries. I do take exception, once again, to the notion that I somehow impeded Temic's ability to receive duplicate copies of -- duplicate original plan cure notices. I wasn't contacted by the McDermott Will office until the earliest on this issue, February 19. It's our position, Your Honor, that McDermott Will is the attorney of record and has been involved in this case, has been actually aware of these procedures since at least when the motion to approve the solicitation procedures order was sought, when the order was entered, when counsel appeared at the confirmation hearing and thereafter.

THE COURT: Well, what is your response to Mr. Sullivan's point that, because of the interplay of the steering business procedures, this is really a different level, a much less and significant level, of prejudice than the others because you don't have to do anything about the --

MR. BERGER: The election.

THE COURT: -- the election in light of that?

MR. BERGER: Your Honor, I think that's a different issue. I think that's a -- it's a different issue. I think that it did receive the plan cure notice and made ref -- I'm sorry, they did receive the steering cure notice, made reference to the fact that a plan cure notice was out there.

And they returned that as early as February 5th, it having been served at the end of January.

THE COURT: But it's the same receivable, right? It's the same two million?

MR. BERGER: It's the same receivable, and what's at play, Your Honor, is two million dollars. Temic has preserved its ability to receive cash if the deal -- the steering divestiture closes pre-emergence. What it's seeking to do is now elect to receive cash if that divestiture closes post-emergence.

THE COURT: And when is the steering business closure supposed to happen?

MR. BERGER: It's targeted for end of March.

THE COURT: Well, as far as the S-1, though, you can't really include this in the S-1 because of that uncertainty, right?

MR. BERGER: The Temic?

THE COURT: Yeah.

MR. BERGER: Correct.

THE COURT: All right.

MR. BERGER: Right. And that's the prejudice, Your Honor. It's the prejudice --

THE COURT: No. Well, I -- but I'm saying you'd have that issue anyway.

MR. BERGER: Not if they foreclose from electing cash

under the plan for failure to obtain and return a plan cure notice.

THE COURT: Well, no, I thought that if they -- they had the second opportunity in connection with the steering business, so you have to reserve the cash anyway.

MR. BERGER: If the sale closes pre-emergence, not at the sale.

THE COURT: No, but that's why I'm saying I don't see how you can -- you know, it's like Barry Bonge (ph.). You would have to include it in the S-1 with an asterisk, wouldn't you, because you may end up paying him in cash anyway?

MR. BERGER: He may get cash anyway if it closes.

THE COURT: So, it's not like locking --

MR. BERGER: If it closes pre-emergence, yes, Your Honor.

THE COURT: So, I mean, it does seem to me to be different in that sense.

MR. BERGER: Your Honor, I think our argument also goes to a different point.

THE COURT: Well, I'm sorry. But what about Mr. Sullivan's point that the steering notice kind of gave him a separate chance anyway, separate and apart from the -- not linked to the closing of the steering business?

MR. BERGER: It doesn't give him a second -- a separate chance for --

THE COURT: Were you making that -- maybe you weren't making that --

MR. SULLIVAN: I was making that point, Your Honor --

THE COURT: All right.

MR. SULLIVAN: -- because the notice specifically says -- it uses --

THE COURT: I thought you were.

MR. SULLIVAN: It uses the word will, which means that you're going to get -- we're going to get another notice. It doesn't refer to any notice that was previously sent.

THE COURT: But isn't that tied to the steering business closure, that that notice is for the steering business if it closes before the effective date?

MR. SULLIVAN: Well, we've gotten that notice already and so we've already been told we're going to get cash if it closes before the effective date.

THE COURT: Okay.

MR. SULLIVAN: So if --

THE COURT: But you're expecting another notice?

MR. SULLIVAN: Well, the notice specifically says that if for some reason it doesn't close before the effective date, you're going to get another notice. That's what it says. And it says you're going to get a plan cure notice. It says will. It doesn't say, you know, refer back to one you previously got.

MR. BERGER: Your Honor, it does not say that.
MR. SULLIVAN: It does. I can --
MR. BERGER: It does not say that.
THE COURT: Well, do you have it?
MR. SULLIVAN: Yes, I do, Your Honor --
THE COURT: Okay.
MR. SULLIVAN: -- and I can quote it to you --
THE COURT: All right.
MR. SULLIVAN: -- if you like, or I can hand it up.
THE COURT: Well, let me look at it.
MR. SULLIVAN: It was attached to the objection in connection with the hearing this past Thursday as Exhibit, either 1 or A; I believe 1.
(Pause)
MR. SULLIVAN: I apologize, Your Honor. It's not stapled. It's --
THE COURT: It's all right.
MR. SULLIVAN: On the first page, you'll see there. It's fastened all together. Specifically, I'll direct you to Paragraph 6.
THE COURT: But is -- I mean -- the --
MR. BERGER: Your Honor, can I help here?
THE COURT: It says that they'll serve the plan cure notice in a time and manner specified under their proposed plan of reorganization. Isn't that the solicitation procedures

order notice? I mean, doesn't that make it clear? I mean, there's nothing else, right?

MR. SULLIVAN: Well, then why use the word will, though? It's very confusing if that's what it means. It should have said -- it should have referred to the one that was previously served then.

THE COURT: Well, but there's only -- there's no other plan. I mean, this is it. There's nothing else --

MR. SULLIVAN: Right, but at that point in time we weren't even aware that there was this notice that was purportedly served on us, so we were just assuming that we would be getting one in the future.

MR. BERGER: Your Honor, I think that's contradicted by facts in evidence. McDermott Will had already received a complimentary plan cure notice. They already knew that there was already one plan that was being solicited and that material supply contracts were being assumed pursuant to notices that were issued pursuant to the plans in the solicitation procedures order.

THE COURT: Okay.

MR. SULLIVAN: Yeah, but Mr. Berger's not test -- Mr. Berger is not implying that every single cred -- contract party received it, a plan cure notice.

MR. BERGER: No, but --

THE COURT: No, but they knew that -- they certainly

got notice of the plan. I mean, there's -- every contract party got notice of the plan confirmation --

MR. SULLIVAN: Well, that's for sure.

THE COURT: -- and in the solicitation procedures order. And just it's hard for me to --

MR. SULLIVAN: Well, that's for sure, but certainly -- I mean, even the procedures order itself refers to the possibility of notices being done after the plan effective date. It talks about responding within forty-five days of the effective date of the plan.

THE COURT: No, but --

MR. SULLIVAN: It's different, Your Honor.

THE COURT: -- I think you're kind of barking up the wrong tree on this one. Is there anything in the record about when exactly the Farmington office was closed?

MR. SULLIVAN: Yes, Your Honor.

MR. BERGER: Your Honor, if there is, I haven't seen it.

MR. SULLIVAN: There's some declarations. There's two declarations. Paragraph 7 of the declaration, which was filed on February 19th, says --

THE COURT: This is the Patton one?

MR. SULLIVAN: Pardon me?

THE COURT: Okay.

MR. SULLIVAN: It says the debtors also sent their

notice of cure amount with respect to executory contract or unexpired lease to be assumed and assigned in connection with the sale of steering and halfshaft business to 37101 Corporate Drive, Farmington Hills, Michigan, which is the old address of one of Temic's offices. This office was closed months ago and a new tenant is now renting the space. And there's probably a similar kind of --

THE COURT: Patton says the same thing, but it doesn't -- it's not particularly specific as to when it was closed.

MR. SULLIVAN: I mean, I could certainly find -- you know, get that information for you if you want, but certainly I think the tenor of the declaration is that it was -- you know, months ago doesn't -- you know, it was within the timeframe that we're talking about, so it's certainly -- this is more than -- is only about a month ago as this notice was sent, so --

THE COURT: There's nothing about Temic providing any notice to the debtor that the office has changed, the headquarters has changed?

MR. SULLIVAN: You know, Your Honor -- I mean, I wish there was a Delphi businessperson here that I could examine.

THE COURT: No, no, but, I mean, usually when a company changes -- closes its headquarters, they make provision --

MR. SULLIVAN: Right, Your Honor, but this isn't a head --

THE COURT: -- with --

MR. SULLIVAN: -- the headquarters was always the Deer Park address; Delphi knows it. They have no excuse for not serving the notice at the Deer Park address. You know, this address has been the one -- you know, Motorola used it, then when Temic bought the business nobody moved seats. Everyone stayed in their seat. It was still the Deer Park address. So they can't come back here now and say we didn't know where to send it. It's been the same address forever and the businesspeople know it. If they have questions or disputes, they don't call any other address; they call the headquarters, and that's stated in the declarations, Your Honor.

MR. BERGER: Your Honor, may I respond to this point? There is nothing specific in the record as to when the Farmington Hills office was closed. Both declarations refer to months ago. Temic bears the burden to rebut the presumption. There is nothing in the record presented by Temic to show that Delphi was notified at all that the Farmington Hills office was closed. There's also nothing in the record to demonstrate what Temic, a large company, did to provide for notifying the postal service, its current tenant or other employees who might be at that address what to do with the mail.

THE COURT: Okay. I suggested last Thursday that Mr. Sullivan do this on short notice because I thought it was tied into the S-1. I still don't see how it is. I mean, if they have a right to the cash, you're going to be issuing fewer shares.

MR. BUTLER: Your Honor, may I address that point? For purposes of the rights offering, we have to create, essentially tonight, a file of who is -- of what the -- who is entitled to get a rights certificate. That, you know, if Temic elects cash, then they don't have a right to the rights certificate. If they -- if they're not permitted, they have not elected cash, then they will be in the rights offering file and they will get a rights certificate. There is a finite number of rights. There is a finite number of --

THE COURT: But they have a separate right to get cash because of the steering business motion.

MR. BUTLER: Yes, and that may very well -- but that doesn't change, Your Honor, the -- right now, their general right is the right -- under the plan is a right -- it may very well be that they'll be able to get cash from steering, but the reality is that the right as to --

THE COURT: Well, what happens to those rights, then, after they get the cash from steering?

MR. BUTLER: It won't be exercised. They'll simply be paid the cash. But that'll be post-rights offering. I

mean, when they get the rights, but I mean -- it'll be after the rights offering's over with, Your Honor. We need to know -- we just simply need to know, as the debtor -- that's why I don't think it's an asterisk in the S-1, Your Honor. I understand Your Honor said that. We have to have a finite number of these are the parties who are going to get rights certificates; this is the amount they're going to get in terms of the rights certificate. We have to do -- Mr. Unrue, who is present in court today, has to do all of those calculations.

THE COURT: But what I'm saying is, is it necessarily that they're going to get them, though?

MR. BUTLER: Well, they'll get the rights because remember, Your Honor, the way in which the confirmation order and the plan are written --

THE COURT: But they'll -- but it --

MR. BUTLER: -- parties get rights as of the -- you know, as -- it's presumed that if you're entitled to get a right at a presumed time, you get it.

THE COURT: But you -- they only get the rights on the effective date.

MR. BUTLER: No.

THE COURT: Well, no, I'm sorry. They -- what -- then -- but if they have -- then they -- how do you avoid the double recovery issue?

MR. BUTLER: Well, Your Honor, obviously there won't

be a -- we would address the double recovery if you got cash at the end of the day. We're not -- we would not, presumably, and I mean we're working on the mechanics on all this stuff out. This is not a perfect world. That would be what happens post-exercise of the rights offer. We're not going to permit double recoveries under the plan. And I -- you know, and I haven't -- I'm not close enough to this particular issue, because I didn't prepare for it, to understand whether their claim in the steering and their claim under these notices are identical. I just don't know the answer to that. The Court may and Mr. Berger may; I don't. What I do know is that, with respect to all of the dispositions that are going on, divestitures are going on, and where there are cure rights that are to be paid in cash under those specific orders because they're closing before emergence, the ones that we knew about ahead of time, we were able to solve the problem because of the rights offering. The ones that are going on contemporaneously, we've gone through this cure process. They've gotten the notices under the plan for the cure because we have to understand whether or not they are participating in the rights offering. That's been the key here, you know. And certainly -- I mean, you know, the --

THE COURT: But under one realistic scenario they wouldn't be because they have the right under the steering order to get cash if the steering deal closes by --

MR. BUTLER: By March 31st.

THE COURT: -- by March 31.

MR. BUTLER: Right, which may or may not happen.

THE COURT: No, I understand that, but I guess -- maybe Mr. Sheehan can explain this.

MR. BUTLER: So all I'm trying to say, Your Honor, is the purpose of getting this determination now is because we need to understand, you know -- put it another way, absent Your Honor granting Temic the right to make this election now, late, and presuming they would make the election in cash, which is why I assume that they're here, absent that, we will, when we finish the rights file tonight, grant them rights in the amount of this cure. I mean, and when I say the amount of the cure, they'll be -- it's whatever the right percentage is.

THE COURT: Right.

MR. BUTLER: But they will go into the rights file that Mr. Unrue is working on. So what we need to understand from Your Honor --

THE COURT: But then what happens if the steering deal closes?

MR. BUTLER: Well, that's another set of issues, Your Honor.

THE COURT: No, but I think I need to know because if it's capable of being unwound, then maybe this thing doesn't have to be heard on such a short timeframe. I mean, if it is capable of being unwound, then I can hear it sometime before

the 31st and you all can explore what I guess is a key issue, which is did Temic do anything to let anybody know to forward the mail?

MR. BUTLER: Your Honor, I would take the position that actually it's two different things, and I'm not trying to be hypertechnical here. We can't redo the rights offering. Once it's out there, it's out there and we have to comply with the S-1 rules. And, so, ultimately --

THE COURT: No, I don't mean --

MR. BUTLER: -- if Your Honor does not rule today in Temic's favor, this motion, in my view, will be moot --

THE COURT: But there's somehow --

MR. BUTLER: -- because --

THE COURT: -- though, you have to prevent a double recovery.

MR. BUTLER: Yeah. I understand that. I understand that problem and I can't stand here before you and tell you how I'm going to address it with the divesters. I have a long list of things we have to do to get ready for closing, Your Honor. I'm going to be very -- I'm just being very open, Your Honor. I can't tell you exactly -- I will tell you this: there will not be a double recovery. You know, I think the mechanic may well be that we would reduce any cash recovery from the value they had already exercised in connection with their rights, but I don't want to speculate. I can't give you a reasoned answer

as to what mechanic we have thought about to prevent double recovery with divestitures as a unique group of people in that category. But that doesn't change the problem we have today, which is who participates in the rights offering and who doesn't? If Your Honor does not grant them a motion today, they will participate in the rights offering, or they'll have the opportunity to because it's self-executing.

THE COURT: Okay.

MR. BUTLER: I mean, that's all I --

THE COURT: Anything else?

MR. SULLIVAN: I mean, if the debtors want a resolution today they can always withdraw their objection.

THE COURT: Well, no, I mean that -- I don't think that works either.

MR. BERGER: Your Honor, I don't think that works for purposes of today or any future motions by other parties.

MR. SULLIVAN: Your Honor, can I make a few comments based upon the response from Mr. Berger, or --

THE COURT: Briefly, yeah.

MR. SULLIVAN: Okay. And I think I heard it correctly but I'm not positive, but I heard Mr. Berger say that he was not relying upon the presumption of service with respect to the Northbrook, Illinois address, and that's the only address which, you know, they have a decent argument that, you know, maybe it was sent. So, if you're not relying upon the

presumption for that address, then they really don't have -- they're not entitled to any presumption at all.

THE COURT: Well, did you say that?

MR. BERGER: I did say that, Judge. I'm relying upon the presumption of receipt of Farmington Hills in the debtor's satisfaction of its obligation of the solicitation procedures order and the presumption of receipt by McDermott Will & Emery.

THE COURT: And the Northbrook, Illinois because why?

MR. BERGER: Because, although it is a correct address, Your Honor --

THE COURT: It's the lab, and it's not on the contract.

MR. BERGER: It's not only the lab and they're not on the contract. Immediately before we came to court, as we were preparing for this, we came across evidence that that envelope was returned to KCC. So I'm not relying upon the presumption of receipt --

THE COURT: Okay.

MR. SULLIVAN: -- which calls into question some of the testimony we heard earlier today, but --

MR. BERGER: But, Your Honor, it does not. I was very particular not to ask the witness whether or not mail was returned at that address and I was very particular introducing that testimony, and thereafter that I was not relying upon the presumption of receipt at that address.

MR. SULLIVAN: So the only evidence of the receipt of this notice is in an address in which Temic does not have a facility anymore, Your Honor, and somebody else is there. It was just by sheer luck that we got it the last time after thirteen days, not the five or six that Mr. Berger is talking about. And it's not in evidence here today and I'm not going to cast dispersions on Mr. Berger. You know, maybe he didn't have direct communications with McDermott until the 19th, which is the date that the -- our objection was filed in connection with the past hearing. But certainly there were communications going on between members of his firm and our firm much, much earlier.

THE COURT: Well, how do I know it's just by sheer luck? I mean, again, normally when people close down an office they make provision to have stuff sent to a new office, right?

MR. SULLIVAN: Yeah. I mean, I know -- I don't know if the presumption applies when you're talking about forwarded mail, but I can tell you, having been through a move fairly recently ourselves from Rockefeller Center to Madison Avenue, a good amount of the mail that was forwarded I didn't get for months later or sometimes not at all. I think there's definitely -- you know, there -- you know, when they're picking and choosing which mails to forward and which to not, I think the presumption goes way downhill, Your Honor, from that perspective.

So, you know, certainly from our perspective we obviously acknowledge that we got the notice with respect to the steering sale. Admittedly it took thirteen days to get it but we eventually got it, but we did not get it with respect to the plan cure notice.

So, therefore, there's really no evidence in the record that we got it, and they can't -- in our opinion, they can't rely upon the presumption with respect to any address because the only address upon (sic) which it allegedly went was an address in which we have a facility.

It's also in dispute -- they didn't dispute the fact that the primary address where the parties do business is the Deer Park, Illinois address and that that is our national headquarters. There's really no explanation why they didn't send notice there, and I think the solicitation procedures order requires that.

THE COURT: But, what -- I mean -- the evidence of that is in -- is where?

MR. SULLIVAN: Of which the -- well, the declarations certainly discuss, for example --

THE COURT: You're relying on Paragraph 24 of Patton's affidavit?

MR. SULLIVAN: Yes, Your Honor. So we'd primarily rely upon Paragraph 24. Plus, we attached numerous examples of other correspondence between the parties, including the

reclamation notice, the proof of claim, the invoices, and I'm sure, you know, if we had more time, we could probably produce an abundance of additional evidence as well. But I'm sure if you had a businessperson here from Delphi, and I know -- and unfortunately we don't, I'm sure they would acknowledge that the parties that they do business with is at the Deer -- primarily do business with is at the Deer Park address.

And, you know, contrary to what Mr. Berger said, we're not saying that they should serve us in every single place where we have a facility. That's not what we're saying. We're only saying that they should have served us at the place where our primary business is, our headquarters. If they had served us there, we wouldn't have any quabble (sic) about, you know, whether or not they had served it at any of these other addresses.

THE COURT: Okay. Just very briefly, Mr. Berger.

MR. BERGER: Your Honor, the declaration and affidavit submitted by Mr. Patton are well after service was made. There's nothing in evidence about notice of change of address. The witnesses that testified today -- those declarations are in the evidentiary record. They show that Delphi used information, addresses in its books and records, an affidavit of service on file. It is Temic's burden to rebut the presumption of receipt at any of the addresses other than Northbrook where notices were sent, including its agent.

MR. SULLIVAN: One other additional point, Your Honor. I believe -- I apologize. I believe the first pleading in the case that was filed on behalf of Temic by McDermott was the February 5th objection in connection with the steering sale business. I don't think there's anything of record having -- you know, saying that McDermott represented Temic prior to that date.

MR. BERGER: Your Honor, I'm sorry to have to stand again. I have been litigating with McDermott Will in connection with the Motorola/Temic claim. The caption on these documents are McDermott Will Chicago, McDermott Will New York. I think the import, if I'm hearing it correctly, is that New York McDermott shouldn't be responsible for actions or inaction of Chicago. It simply doesn't carry weight. They're an agent for a claimant in this case and they're responsible no matter where the partner in that representation sits.

MR. SULLIVAN: That really wasn't the argument I was making, Your Honor.

THE COURT: All right. I have before me a motion by Temic Automotive North America in respect of its request under Rule 9006 of the Bankruptcy Rules and Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 507 U.S. 380 (1993) for extension of its time to respond to a cure notice required to be sent by the debtors under the Court's solicitation procedures order dated December 10, 2007

to those parties, those nondebtor contract parties, with whom the debtors intended to assume the executory contracts between the parties.

The first contention by Temic is that it really doesn't need to get to the Pioneer factors because it never received the relevant cure notice. The record shows that the relevant cure notice, which pertained to a two plus million dollar cure claim, was sent to a Farmington Hills location, which was the address on Delphi's purchase order in connection with the contract. The purchase order is dated September 10, 2001. No specific reference to that cure claim was sent anywhere else to Temic, although a courtesy copy notice, generic, was sent to Temic's law firm, McDermott Will & Emery, at least the firm that had appeared on behalf of Temic in the Chapter 11 case that alerted McDermott Will generally that the debtor was intending to assume executory contracts and send out a cure notice related thereto to parties to which a client of McDermott might have a relationship.

Before turning to the Farmington Hills notice, I should say two things about the notice that was sent to McDermott Will. First, it was the notice attached to the solicitation procedures order as Exhibit P. That is, it was the notice to holders, assignees, transferees and purchasers of claims of cure procedures. Temic itself didn't fall into that category; it's an actual contract party.

Secondly, the notice itself didn't refer to this but the envelope in which the notice was enclosed referred specifically to a claims purchaser, a subsidiary, Silver Point Capital, so that the recipient of that notice might assume that the notice pertains to a claim purchaser's need to speak to its assignor, and B, that the specific claim purchaser that triggered this was Silver Point Capital, which otherwise had nothing to do with this matter.

And finally, the notice was sent not to McDermott Will's Chicago office, which was the office primarily dealing with the debtor in the Chapter 11 case on behalf of Temic, but rather to McDermott Will's New York office. I think, notwithstanding that fact, if the notice had been either broader, i.e., referring to your clients may have contracts that are being assumed as opposed to pertaining just to claims purchasers and assignees and transferees, or if it had not even referred specifically to Silver Point, it may have been incumbent upon McDermott Will's New York office to get in touch with the Chicago Office. But given those other two facts, I think that, as a practical matter, it wasn't an effective notice or certainly it would be notice to which one would argue that the excusable neglect doctrine would apply.

So then the issue is what is the import of the notice being sent to Farmington Hills? I accept Mr. Gershbein's testimony and his affidavit of service that the notice in fact

was sent to Farmington Hills. And it is clear under the case law in this circuit and elsewhere that notice is presumed to have been properly sent if it's properly addressed, stamped and deposited in the mail system, as Mr. Gershbein has testified. See In re R.H. Macy & Co., Inc., 161 B.R. 355, 359 (Bankr. S.D.N.Y. 1993), as well as In re Dana Corporation, 2007, WL 1577763 at 4 (Bankr. S.D.N.Y. 2007). A claimant needs to submit clear and convincing evidence to overcome the presumption of delivery, such as, for example, showing an incorrect address or a returned letter or the like, neither of which appears here. Again, see Dana Corporation as well as In re Randbre, R-A-N-D-B-R-E, Corporation, 66 B.R. 482, 485 (Bankr. S.D.N.Y. 1986).

So I believe notice was sent. The issue, though, is whether, although it was properly sent, whether it went to Temic, and that is because Temic has stated in that uncontroverted affidavit by Mr. Patton that it had closed its Farmington office months ago and therefore was not there to receive the notice.

The debtor states however that, notwithstanding such closure, the debtors' subsequent notice of a cure claim right and assumption and assignment right in respect of the same contract, I believe, was clearly received when it was sent to the Farmington Hills address because the cure claim notice was sent back appropriately marked by Temic in connection with that

steering claim matter.

And there is nothing in addition in Mr. Patton's affidavit or anything else I can see in the record as to whether Temic took any steps to ensure that letters received by it, including legal notices of this kind, would get forwarded to it, notwithstanding the closure of its Farmington Hills office. Temic also argues that the debtor should have sent the notice to what it describes as its headquarters, but I note that the purchase order which governs the parties' relationship has the Farmington Hills address on it, and I accept Mr. Unrue's testimony that there was no reason to look beyond that purchase order, in particular, not to take into account any of the invoices that Temic has offered up because the parties' relations are not governed by the invoices but rather the parties would pay or arrange for payment as provided in the purchase order. Nor is there any evidence that Temic notified the debtors that it had changed the address that's listed on the purchase order, notwithstanding the apparent fact that it was well aware of the debtors' Chapter 11 case.

To my mind, that leaves the parties in the realm of excusable neglect as opposed to never having received notice in the first place. As I noted earlier today, in the second circuit the Courts have taken a hard line in applying the Pioneer test, as the second circuit said in Midland Cogeneration Venture Ltd. Partnership v. Enron, 419 F.3d 115 at

366 through 68 (2d Cir. 2005). In a typical case, three of the Pioneer factors, the length of the delay, the danger of prejudice and the movant's good faith, usually weigh in favor of the parties seeking the extension. The Court noted, though, that we and other circuits have focused on a third factor, the reason for the delay, including whether it was within the reasonable control of the movant. And we cautioned that the equities will rarely, if ever, favor a party who fails to follow the clear dictates of a court rule, and that where the rule is entirely clear we continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the Pioneer test.

The second circuit was there quoting Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 368 (2d Cir. 2003). See also In re Musicland Holding Corporation, 356 B.R. 603 (Bankr. S.D.N.Y. 2006), in which Chief Bankruptcy Judge Bernstein noted that, in determining excusable neglect under Pioneer, the reason for the delay is the Court's primary focus. Any other factors are relevant only in close cases.

I think, given the uncontroverted testimony, that the contract party here, Temic, in fact was not in its offices when the notice was sent in Farmington Hills. This is a close case. Arguably, Temic should have introduced more evidence today that it did -- it took normal and rudimentary steps to ensure that it would get forwarded appropriate notices from the Farmington

Hills office. On the other hand, because of exigencies in the Chapter 11 case, in particular, the need for the debtors to file their S-1, according to the debtors, by the end of this week, the issues had to be brought on, on very short notice.

It is true that the Pioneer issue was only raised at my direction as of last Thursday, but Temic did respond, apparently. Well, it did respond to the debtors' motion to strike cure notices that had been brought on for a hearing on the 21st with an objection that was timely filed to that motion.

So, it seems to me that there is some balance there as to whether Temic acted diligently or not and whether Temic has been through -- shoehorned into a case where it can't put his best proof forward on short notice.

As far as prejudice to the debtor is concerned, as noted at oral argument, it's conceivable, in fact, more than conceivable that this issue ultimately is moved and that the steering business sale order contemplated the ability of contract parties, like Temic, to get a cure claim paid in cash as opposed to in stock with post-petition interests. And it is the cash payment that Temic wants.

So, while I accept that the debtors have to fish or cut bait as to what they put in their S-1 this week, ultimately it's conceivable that, as an economic matter, this issue, as far as Temic is concerned, will never really surface, assuming

that the steering business closes before March 31st.

It appears to me that Temic acted in good faith. I have already addressed the length of the delay where there is some fault to be had on Temic's part, but it's not overriding. So, given all of that, it seems to me that, in the absence of additional prejudice to the debtor and the fact that the one key notice did go to a location where Temic no longer conducted business, that Temic's motion should be granted. So, Mr. Sullivan, you can submit an order to that effect.

MR. SULLIVAN: Thank you, Your Honor. I appreciate it.

MR. BUTLER: Your Honor, one other, just, matter which would help us in the administrative purposes of Mr. Sullivan. I assume on this record Mr. Sullivan's client is electing cash, not wanting to participate in the rights offering.

MR. SULLIVAN: Yes, Your Honor.

MR. BUTLER: And therefore, in the form of order, if it can be reflected that it will be deemed to have made a cash election as of the bar date, and we will reflect that in the rights offering file.

MR. SULLIVAN: Yes, Your Honor.

THE COURT: You don't have to take any further actions to make any election. It's been done.

MR. SULLIVAN: Great. Thank you, Your Honor.

THE COURT: Okay.

MR. BERGER: Thank you, Judge.

THE COURT: Okay. All right.

(Whereupon this hearing was concluded at 4:32 PM)

I N D E X

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C E R T I F I C A T I O N

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